The Central Law Journal.

ST. LOUIS, OCTOBER 4, 1889.

THE enforcement, of the recent Missouri enactment, prohibiting pools, trusts and conspiracies, which is about to be inaugurated, will be watched with interest in all parts of the country. The law provides that the Secretary of State shall prepare a blank form of affidavit, to be transmitted with his letter to every corporation doing business in that State, whether organized under the laws of that or any other State or country, and that some affidavit shall be made by the president, secretary, treasurer, or any director of such corporation, setting forth that his company was not, on May 18, 1889 (the date of approval of said act), or at any day since that date, a member of any trust, pool, or combination, intended to limit or fix the price or lessen the production and sale of any article of commerce, use or consumption, or to prevent, restrict or diminish the manufacture or output of any such article. This affidavit must be returned to the Secretary of State, on penalty—if a home corporation—of revocation of charter; or if a foreign corporation, be subjected to prosecution as provided by law. It is known, that in several cases, trusts and pooling arrangements have been abandoned, since the passage of the act, but the majority have stood firm and express confidence in their ability to circumvent the law. Just how this is to be accomplished has not yet been made public, but the chances are that many interesting questions will be mooted, and that the trusts will not surrender until all expedients are exhausted.

As was to be expected, the United States Court, in the *habeas corpus* case of Deputy Marshal Nagle, declared the killing by him, of Judge Terry justifiable homicide. This decision was prompted, we apprehend, more by a consideration of the characters of the assaulted party, and the aggressor, than by a strict construction of the law governing the right of self defense. We heretofore took the ground, that the killing of Terry by Nagle was without strict warrant of law. And we have seen no reason to change that opinion, notwithstanding the fact that almost every newspaper and magazine in the United States joined in unqualified applause of the act. We did not, nor do we now defend Judge Terry, and we are free to say that he deserved all that he got. But we most emphatically condemn the doctrine, which permits, even an officer of the law, to shoot down even a man of Terry's disposition, who neither exhibited dangerous weapons, who gave no evidence whatever of having any such on his person, and who, as a matter of fact, had none. The learned editor, of the *Albany Law Journal* says, that the trouble with our view is that Mr. Nagle had no time to examine Mr. Terry's pockets to ascertain that fact. But it is clear to our mind that, before he was justified in shooting, he should have had more evidence of murderous intent on the part of Terry, than was disclosed by his slapping Justice Field's face, and the threats theretofore made. We cannot resist the belief that, had Justice Field been an ordinary citizen and Judge Terry not an extraordinary one, this killing would have been viewed in an entirely different light, and even a United States Marshal would not have been allowed to set himself up as judge, jury and executioner.

Notwithstanding all this, we do not, in the least, question the propriety of protecting judges of the courts, and we feel sure that litigants like Terry should, in some lawful manner, be muzzled or confined.

SOME time ago, the fact was noted in these columns, that a subordinate State court in Minnesota had declared unconstitutional the Meat Inspection law passed by the legislature of that State, and we then expressed the doubt whether upon appeal and further consideration, that decision would be upheld. We came to that conclusion largely by analogy to the liquor prohibition, and oleomargine laws of several of the States, which in every instance have been upheld. But, to weaken our doubts, come the decisions of Judge Blodgett, of the United States Circuit Court at Chicago, and of Judge Nelson, of the United States Circuit Court at St. Paul,

both declaring the law unconstitutional, and, it must be said, upon strong and apparently tenable grounds. The argument was, that within the last few years, by means of appliances for the preservation of meats and the facilities for rapid transportation, a large and almost new business had grown up in the slaughter and carriage of fresh meats, making it an important item of interstate commerce. At the last session of Congress, a committee was appointed by the Senate to investigate during recess and report on some phases and methods of the business, so there could be no doubt that dressed meats were articles of interstate commerce. The Minnesota act purported, by its title, to be an act for the protection of the public health, and it was insisted that it was valid because it was a police regulation coming within the purview of the State government. A cursory glance at its provisions showed that its practical effect was, to exclude all dressed meats from animals slaughtered outside of Minnesota. The animals not only must be inspected within twenty-four hours before death, but they must be inspected within the State, for the only provision was as to State officers, who could have no power out of the State. In effect, therefore, the statute excluded the sale of meat from animals slaughtered in other States. While the State legislatures were clothed with large discretion, as to police powers for the protection of the health, property and persons of citizens of the State, the power must be exercised so as not to interfere with matters over which the federal government had exclusive jurisdiction. No matter how speciously a State statute might be worded, if in its operation it infringed upon the sphere of the federal government, it was so far void. The power of Congress to regulate the introduction of articles of commerce necessarily implied the right to authorize the sale of commercial articles so introduced. The statute of Minnesota met, at the border of the State, an article of commerce intended for human food, and arbitrarily declared it unfit for such purpose and prohibited its sale. This seemed to the court a palpable invasion, by the State, of the domain of Congress. The State might provide for the inspection of such articles and prohibit their sale, if in fact they were unfit for use; but even the power of inspection was so limited by the first clause of article XV of the federal constiturion that the citizen of another State owning such articles was to be treated in the same manner as a citizen of the State into which the article was imported. The argument that the living animal should be inspected before slaughter, in order to determine whether it was fit for slaughter, was specious but unsound. The reasoning might be applied to any manufactured article which was the subject of commerce. The wholesomeness of flour, cured meats, canned fruits, fish, etc., could perhaps be more accurately determined, if the raw material from which they were produced was inspected before manufacture; but the admission of the doctrine, that a State could interdict the introduction and sale of an article of commerce, unless it was inspected by officers of the State, in its raw condition, would put all commerce of the State within the control of its legislature.

NOTES OF RECENT DECISIONS.

THE Supreme Court of the United States, in Kennon v. Gilmer, settled for the United States courts the question as to the power of an appellate tribunal on reviewing a judgment in a common law action for tort on the ground of excessive damages or insufficiency of evidence, to reduce the judgment on that ground. The plaintiff had recovered a verdict of over $20,000 for personal injuries, and the Supreme Court of Montana, on the ground apparently of excessive damages, indicating the influence of passion or prejudice, ordered the judgment to be reduced by $10,000, half of the general damages, and as so reduced affirmed. In error to the Supreme Court of the United States both parties claimed that the judgment should be reversed; the plaintiff insisting that he ought to have judgment on the verdict, and the defendant that there should be a new trial. The supreme court hold that the court below ought either to have affirmed absolutely, or granted a new trial absolutely, or to have granted a new trial unless plaintiff would consent to remit a part of the verdict, which that court had power to do; but that the su-

preme court had no [power to fix a sum, but must reverse, with a direction to the Supreme Court of the Territory to dispose of the case anew. The court says:

The judgment of the Supreme Court of the Territory, reducing the amount of the verdict, and the judgment of the inferior court thereon, without submitting the case to another jury or putting the plaintiff to the election of remitting part of the verdict before rendering judgment for the rest, was irregular, and, so far as we are informed, unprecedented; and the grounds assigned for that judgment in the opinion sent up with the record, as required by the rules of this court, are far from satisfactory.

Those grounds were, in substance, that the court, applying the rule that the verdict of a jury will not be disturbed if there is evidence to support it, unless it seems to have been the result of passion or prejudice, was satisfied that the clear weight of the testimony stongly favored the defendant's position that there was no negligence on their part and the plaintiff's injury was the result of unavoidable accident, and that "this large verdict comes from something outside of testimony;" as well as that "if the case had been between two strangers unknown to the jury and tried on this evidence, if there had been a verdict at all for the plaintiff, it would have been for a very much less sum," and "the evidence does not support this verdict;"—the legitimate inference from all which would seem to be that the whole verdict was tainted by passion or prejudice—yet the court, because it could not "say that there is no evidence to support a verdict for such an amount as the plaintiff ought to recover," forthwith proceeded to adjudge that the verdict and the judgment thereon be reduced to what in its opinion was such an amount, without apparently considering the question of its power to do this (5 Montana, 273, 274). The seventh article of amendment of the constitution declares that, "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." This article of the constitution is in full force in Montana, as in all other organized territories of the United States (Act of May 26, 1864, ch. 95, § 13, 13 stat, 91; Rev. Stat. § 1891; Webster v. Reid, 11 How., 437). In accordance therewith, the Code of Civil Procedure of Montana, provides that "an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered by consent of the parties" (sec. 241). That Code authorizes the court in which a trial is had, or the Supreme Court of the Territory on appeal, to set aside a verdict and grant a new trial for "excessive damages appearing to have been given under the influence of passion or prejudice," or "for insufficiency of the evidence to justify the verdict" (§§ 285, 408; act of amendment of 1881, § 7). And by § 428 of that Code, "upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from in the respect mentioned in the notice of appeal, and as to any or all of the parties;" "and may, if necessary or proper, order a new trial." But this section does not authorize the appellate court to render a judgment which the lower court could not have rendered.

Under these statutes, as at common law, the court, upon the hearing of a motion for a new trial, may, in the exercise of its judicial discretion, either absolutely deny the motion, or grant a new trial generally, or it may order that a new trial be had unless the plaintiff elects to remit a certain part of the verdict, and that, if he does so remit, judgment be entered for the rest (Hopkins v. Orr, 124 U. S. 510; Arkansas Cattle Co. v. Mann, 130 U. S. 69). And if the pleadings and the verdict afforded the means of distinguishing part of the plaintiff's claim from the rest, this court might affirm the judgment upon the plaintiff's now remitting that part (Bank of Kentucky v. Ashley, 2 Pet. 327). But this court has no authority to pass upon any question of fact involved in the consideration of a motion for a new trial. And, in a case in which damages for a tort have been assessed by a jury at an entire sum, no court of law, upon a motion for a new trial for excessive damages and for insufficiency of the evidence to support the verdict, is authorized, according to its own estimate of the amount of damages which the plaintiff ought to have recovered, to enter an absolute judgment for any other sum than that assessed by the jury. By the action of the court in entering an absolute judgment for the lesser sum, instead of ordering that a judgment for that sum should be entered if the plaintiff elected to remit the rest of the damages, and that if he did not so remit there should be a new trial of the whole case, each party was prejudiced; and either, therefore, is entitled to have the judgment reversed by writ of error. The plaintiff was prejudiced, because he was deprived of the election to take a new trial upon the whole case. The defendants were prejudiced, because if the judgment for the lesser sum had been conditional upon a *remittitur* by the plaintiff, the defendants, if the plaintiff had not remitted, would have a new trial generally; and if the plaintiff had filed a *remittitur* and thereby consented to the judgment, he could not have sued out a writ of error, and the defendants would have been protected from the possibility of being obliged in any event to pay the larger sum. Whereas upon the absolute judgment entered by the court, without any election or consent of the plaintiff, the plaintiff had the right to sue out a writ of error; and he availed himself of that right, and docketed his writ of error in this court before the defendants docketed their writ of error. The defendants were thus put in the position of being obliged to contest the plaintiff's writ of error, in order to defend themselves against being held liable for the larger sum, as the plaintiff contended that they must be upon this record. The erroneous judgment of the Supreme Court of the Territory being reversed, the case will stand as if no such judgment had been entered; and that court will be at liberty, in disposing of the motion for a new trial, according to its view of the evidence, either to deny or to grant a new trial generally, or to order judgment for a less sum than the amount of the verdict, conditional upon a *remittitur* by the plaintiff.

THE limitations, upon the power of a State to legislate on the subject of interstate commerce was considered by the Supreme Court of Mississippi, in Louisville, N. O. & T. R. Co. v. State. Act Miss., March 2, 1888, provides that "all railroads carrying passengers in this State (other than street railroads), shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger

cars for each passenger train or by dividing the passenger cars by a partition so as to secure separate accommodations." It was held that as this act operates only upon the carriage of passengers from points within the State to other points also within the State, it was not an interference with interstate commerce. The court says:

The development of an immense interstate commerce, with its incidental multitude of phases and ramifications, has disclosed to the generation of this day the magnitude of the power delegated to the federal government by that clause of section 8, art. 1, of the constitution, by which congress is given power "to regulate commerce with foreign nations and among the States, and with the Indian tribes." It is not surprising that the recognition of its extent has been of gradual growth in the court called upon to construe it, nor that in judicial utterances there have been inconsistent and conflicting expressions. It does not lie within our province to point out or criticise real or supposed inconsistencies, but, taking the more recent decisions of that court, where they have limited or overruled prior cases, to apply the principles, as we understand them to be now announced, to the cause before us. But it does not follow that we are to treat decisions not clearly overruled as not longer binding because remarks are to be found in later cases which, somewhat extended, may be thought to be applicable to the facts here involved. We consider it to be settled, as stated by counsel for appellant, that transportation of persons is as much commerce as transportation of property, and, as a corollary, that the interstate transportation of persons is interstate commerce, and that the State may not regulate such commerce, since it is national in character, and requires uniformity of regulation. It may also be conceded that absence of legislation by congress on the subject is indicative of its will that such commerce shall be free and untrammeled. The question returns, whether the act under consideration is a regulation of interstate commerce, and upon its solution hinges the controversy. The cases of Hall v. De Cuir, 95 U. S. 485, and Railroad Co. v. Illinois, 118 U. S. 557, 7 S. C. Rep. 4, are relied upon as decisive against the validity of the statute. We do not so understand them. Hall v. De Cuir was a case in which the validity of a statute of the State of Louisiana was involved. The statute, in effect, required all persons engaged within that State in the business of common carriers of passengers to admit all persons traveling on the conveyance employed in the business to equal privileges in all parts of the conveyance, without discrimination on account of race or color, and a right to recover actual and exemplary damages was given to any person injured by the refusal of the carrier to comply with the law. De Cuir, a passenger from one point to another within the State, was refused access to the cabin reserved for white passengers on a steamer engaged in interstate business on the Mississippi river, and brought suit against the owner of the boat to recover damages. The statute was held unconstitutional by the Supreme Court of the United States, as being a regulation of interstate commerce. As observed by this court in Stone v. Railroad Co., 62 Miss. 607, the State of Louisiana had no relation to or control over the instruments by which the commerce was conducted. It was an attempt to regulate an interstate carrier, acting under license from the United States, and plying the navigable waters of the same. The State had no control over the way, the boat, or the owner. It was an attempt to regulate that which it did not create or license, and which it might neither control nor destroy. The language of the court, as applied to the facts of this case, is compatible with a liberal exercise by the State of power over its own corporations, which live and move and have their being by virtue of its laws. It is urged, however, that in Railroad Co. v. Illinois, *supra*, it has been held equally incompetent for the State to regulate interstate commerce, conducted over artificial ways created by the State, or under its authority, as to regulate commerce on the navigable waters of the United States. In that case the only question presented or decided was whether a State statute, controlling the rates to be charged by the common carrier for transportation of freight within the State, could be applied to a contract for continuous transportation from a point without to a point within the State. It was held that it could not, since the contract was for interstate commerce, and, as such, not within State regulation or control. In delivering the opinion of the court, Miller, J., reviews the cases of Munn v. Illinois, 94 U. S. 113; Railroad Co. v. Iowa, *Id.* 155; and Peik v. Railroad Co., *Id.* 164, and declares much that was said in them to have been decided without sufficient consideration. His criticism of those cases was, however, confined to so much thereof as affirmed the right of the State, in the absence of legislation by congress, to regulate the transportation of property or persons from points within to points without the State. We are not warranted in extending the effect of the decision so as to include denials of the right of the State to regulate domestic transportation, though conducted by carriers engaged in interstate commerce. Indeed, the express language of the court excludes such conclusion; for the majority opinion declares that, "if the Illinois statute could be construed to apply exclusively to contracts for a carriage which begins and ends within the State, disconnected from a continuous transportation through or into other States, there does not seem to be any difficulty in holding it to be valid." The question here is a different one from either of those involved in these cases. It is more nearly akin to that decided in Stone v. Trust Co., 116 U. S. 307, 6 S. C. Rep. 334, 388, 1191, in which the right to regulate domestic commerce was considered and upheld. It is a matter of common knowledge that there are, at present, many State commissions for the regulation of State commerce, and one by the general government for the regulation of that between the States. Each occupies a field from which the other is excluded, and each is essential, or deemed so to be, to full control of the commerce of the country. By what authority can the transportation of domestic travelers be controlled if not by that of the State? Congress has no jurisdiction over the subject, it being confined to commerce "with foreign nations, and among the States, and with the Indian tribes." Suppose congress should deem it advisable to enact a law similar to our statute for the regulation of interstate transportation of passengers; could it be contended that it controlled as to passengers taken up and set down within a State? But how does the statute interfere with interstate commerce, if it be true that it has no application save to those traveling wholly within the State?

THE statutory liability of directors of corporations for malfeasance in connection with the management of such corporation was con-

sidered by the Supreme Court of Minnesota, in Patterson v. Minn. Manuf. Co. Among other things it was held that a creditor of the corporation may sue one or more of the directors to enforce the liability without joining all the creditors to whom they are liable, or all the directors subject to the liability. The fact that the affairs of the corporation have been placed in the hands of a receiver neither takes away nor suspends this right of action. It is not necessary that the creditor before suing the directors shall have obtained judgment against the corporation. He may, if necessary, join it as co-defendant with the directors, and establish his claim against the corporation in the same action. The court says:

We have referred to these various sections, not only because, as we think, the particular language used is itself strongly indicative of the kind of action intended by the legislature, but because the nature, extent, and purpose of the liabilities imposed illustrate what form of remedy would be adequate and appropriate under the circumstances. In every instant the language is "in an action founded on this statute," not some other. We cannot agree with counsel for the defendant that this merely creates a right and a liability, but prescribes no remedy. It is true, it does not specify the particular form of the action, but unless it is indicative of the remedy it has no meaning whatever. Indeed, in a jurisdiction where law and equity are administered separately, it has been held that such language in a statute gave a party an adequate remedy at law, and hence that a bill in equity would not lie. Bassett v. Hotel Co., 47 Vt. 313. Again, it will be observed that in every instance the liability created is directly to the creditors, and not to the corporation. The corporation could not maintain an action to enforce any such liability; neither could its assignee or receiver, in the absence of some express statutory authority. And right here we think counsel for defendant has fallen into a radical error. He argues that, except in extent, the liability is that which at common law would rest upon directors under similar circumscances; that at common law, for such acts of negligence or misconduct, the directors would be liable primarily to the corporation, and secondarily to the creditors; that the statute does not alter the relative rights of these parties; and hence that creditors, in attempting to enforce the liability, must do so in the right of the corporation or its receiver, and if the corporation is placed in the hands of a receiver the right passes primarily to him. The conclusion sought to be drawn from this line of argument is that an action under chapter 76, by the receiver, is the only remedy. The relation between a corporation and its officers is that of principal and agent, and for negligence or fraud in the performance of their official duties resulting in damage to the corporation they would be doubtless liable to the latter at common law. But the extent of the liability would be the amount of resultant loss. Again, the directors of a corporation are not in any contractual relation with its creditors. They are strangers to each other. The creditors have no cause of complaint on account of any unlawful act of corporate officers, provided sufficient assets remain to pay their claims. Of course, as in case of any other persons, strangers to each other, directors would be liable at common law or equity to make just compensation for any wrong done to the legal rights of creditors. For example, if they misappropriate any part of the capital stock, (which, in America, is held to be a trust fund for creditors), they might be held liable as trustees to the extent necessary to pay the debts; and, as in the case of liability to the corporation, the limit of the liability would be the amount of resultant damage. But the liability imposed under this statute has no relation whatever to the amount of actual damage to either the creditors or the corporation. For doing or failing to do certain things the directors or officers are made absolutely liable for certain classes of debts, although such acts or omissions may not in fact have resulted in a dollar's loss to either the corporation or its creditors. In this respect it is highly penal, so much so that it would not, under the law of comity, be enforced in another jurisdiction. The object is twofold—First, to enforce diligence and fidelity on the part of corporate officers; and, second, to furnish a prompt and efficient remedy to those creditors who were, or might have been, injuriously affected by the acts of misfeasance or non-feasance. The question as to the proper remedy to enforce the personal liability of stockholders or directors or officers for corporate debts depends so much upon the terms of particular statutes or the remedial systems of different States, that not much aid can be obtained from the decisions of other courts. But we think it will be found generally true that, unless a particular remedy is prescribed by statute, the form of the remedy, whether by action at law by each creditor against one or more stockholders or officers, or by bill in equity in which all persons in interest or to be affected are made parties, is made to depend upon the character of the liability. If its object is to create a common fund, limited in amount, for the benefit of all creditors, or all of a particular class, so that if one were allowed to proceed alone he might exhaust the fund or get more than his share; or if the liability was only for the deficiency of corporate assets, or only for the excess of debts contracted over the amount permitted by the charter, so that an accounting is necessary; or if for any similar reason an action at law would be inadequate to furnish a complete remedy or protect the rights of all persons interested—the courts have generally held, in the absence of any express statutory provision, that a suit in the nature of a bill in equity, bringing in all interested parties, must be resorted to. Horner v. Henning, 93 U. S. 228, is an example of this kind, and these considerations were given much weight in Allen v. Walsh 25 Minn. 543, and Johnson v. Fischer, 30 Minn. 173, in determining that the exclusive remedy was under chapter 76. But no such reason obtains here. The liability of each director is unlimited except by the amount of the corporate debts which fall within the terms of the statute. What one creditor may collect will not reduce the amount which another may recover. No accounting is necessary in order to ascertain the amount of the deficiency of corporate assets, for the creditor is not bound to resort to them first; nor is his recovery limited to the extent of such deficiency. In fact, a direct action by any creditor against any director not only furnishes an adequate remedy, but it interferes with the right of no one else. The only possible exception to this might be an action under section 139 against stockholders. In short, reason but adds force to what seems the plain meaning of the language of the statute, viz., that the right of action is directly to the

creditors to whom severally the directors are jointly and severally liable. The fact (which appears from the complaint) that the affairs of the corporation have been placed in the hands of a receiver neither takes away nor suspends the creditor's right of action against the directors. The affairs of the directors are not in the hands of a receiver, nor will a suit against them at all interfere with the proceedings to wind up the affairs of the corporation. If it be necessary, as counsel argue, for a creditor to establish his claim against the company, and that it cannot be sued without leave of the receiver or the court, it would not alter the case, except that if such consent could not be obtained it might embarrass the creditor in enforcing his remedy. In what has been said we do not wish to be understood as holding that these statutory liabilities might not also be enforced by proceedings under chapter 76. It would seem that its provisions are broad enough to cover such a case. All that we hold is that a creditor is not bound to resort to it, because the statute gives him a right of action directly against the directors, and in his own behalf alone. Neither is it necessary that, before suing the directors, the creditor should have first established his claim against the corporation by judgment. There is no occasion for this, inasmuch as he is not required, first, to resort to the corporate assets. Assuming it to be true that he must establish his claim against the corporation, he may, as was done in this case, make it a co-defendant with the directors, and establish the claim in the same action. The acts charged in this case as constituting the violation of the act resulting in the insolvency of the corporation are, that during all the period from December, 1875, down to January 15, 1888, the directors executed in the name of the corporation large amounts of accomodation paper, for which no consideration was received, and loaned corporate money to other persons, for which no return was ever received, thereby diverting funds to purposes not authorized by law. The allegation is that by reason of this course of conduct in executing accommodation paper and making unauthorized loans the corporation became insolvent, so that on January 15, 1888, its affairs were by the court placed in the hands of a receiver. Plaintiff's debt was contracted in April, 1883, and defendant claims that inasmuch as the acts which caused the insolvency were not then completed, therefore it does not fall within the terms of the statute — a debt "contracted after such violation." Such a construction would render the section of very little force. It rarely occurs that a single act alone renders a corporation insolvent. This is usually the result of a series of acts or a continuous course of conduct. In this case it was the diversion of corporate capital, begun in 1875 and continued down to 1888, which, as alleged, produced the insolvency. If, in a series of acts or a continuous course of conduct, those committed prior to the date of plaintiff's debt contributed, in connection with those committed afterwards, in producing the insolvency, then the debt was one contracted "after such violation," within the meaning of the statute. It is also urged that these acts were merely the unauthorized acts of the directors, and not of the corporation, within the language of the statute, which is: "If any corporation, etc., shall violate." This would render the section wholly nugatory. A corporation can act only through its directors and officers, and it is against just such *ultra vires* or unlawful acts on their part that the statute is aimed.

An interesting phase of the law pertaining to master and servant, and the assumption of risks of employment, was involved in the decision of Brazil Block Coal Co. v. Gaffney, by the Supreme Court of Indiana. There it was held that a boy of ten years of age, who is employed at a coal mine, and directed to couple coal cars, a hazardous duty, does not assume the risks of the employment, as they cannot be apparent to his immature judgment, but the master impliedly agrees to require no work of the boy beyond his capacity, and the latter can recover for injuries received in the attempt to obey his instructions, and that where such a boy is placed under the direction and control of the "boss" of the mine, who has general charge of the workmen including the handling of the cars, and is directed by him to quit his regular employment, and to couple cars, the employer is liable, as the order was given in the apparent discharge of the duty of a superior servant, and the boy will be supposed to have considered it his duty to obey, regardless of the possible dangers. The court says:

The proper distinction, as we think, is taken in the case of Sullivan v. Manufacturing Co., 113 Mass. 396. We take the following from the opinion of the learned judge in that case: "Though it is a part of the implied contract between master and servant (where there is only an implied contract) that the master shall provide suitable instruments for the servant with which to do his work, and a suitable place where, when exercising due care himself, he may perform it with safety, or subject only to such hazards as are necessarily incident to the business, yet it is in the power of the servant to dispense with this obligation. When he assents, therefore, to occupy the place prepared for him, and incur the dangers to which he will be exposed thereby, having sufficient intelligence and knowledge to enable him to comprehend them, it is not a question whether such a place might with reasonable care and by reasonable expense have been made safe. His assent has dispensed with the same performance on the part of the master of the duty to make it so. Having consented to serve in the way and manner in which the business was being conducted, he has no proper ground of complaint, even if reasonable precautions have been neglected. In the present case the evidence of the plaintiff was that he went to work in the place pointed out by the defendants. He thus consented to the dangers attending the work, all of which were apparent, and if he had sufficient knowledge and capacity to comprehend them he cannot now complain that such place might at moderate expense have been made safer. * * * It may frequently happen that the dangers of a particular position for or mode of doing work are great and apparent to persons of capacity and knowledge of the subject, and yet a party, from youth, inexperience, ignorance, or general want of capacity, may fail to appreciate them. It would be a breach of duty on the part of a master to expose a servant of this character, even with his own consent,

to such dangers, unless with instructions or cautions sufficient to enable him to comprehend them, and to do his work safely, with proper care on his own part. It was therefore competent for the plaintiff to show that there had been such a breach of duty on the part of the defendants, and although he had in fact gone to work in the place pointed out, assenting so to do, yet that he was incapable of appreciating the dangers to which he exposed himself, or of doing the work safely, without instructions or cautions, which he did not receive."

The following is from the opinion delivered by Hoar, J., in Coombs v. Cordage Co., 102 Mass. 572, which is a leading case: "Whether it was possible for the plaintiff to have met with the accident from inadvertence or want of acquaintance with the danger of his position, without being chargeable with a want of reasonable care, we think is a question to be submitted to the jury. The facts that he saw, or might have seen, the machinery in motion, and might have known that it was dangerous to expose himself to be caught in it, are considerations which should be regarded on one side. On the other, some allowance should be made for his youth, his inexperience in the business, and for the reliance which he might have placed upon the direction of his employers." See O'Connor v. Adams, 120 Mass. 427. In the case of Rock v. Orchard Mills, 142 Mass. 522, 8 N. E. Rep. 401, which was a suit brought by a boy thirteen years old to recover for personal injuries, the court decides that it was the duty of the defendant to give suitable instructions to the plaintiff, having reference to his age and capacity, so as to enable him to understand the dangers, whatever they were, of the employment in which he was engaged. Where the master orders his servant, a child, into a service which he did not undertake to perform, and while in such service, the same being attended with peculiar hazard, if the servant is injured while obeying the command, the master is liable. 2 Thomp. Neg. p. 976, §§ 7, 8.

In Railroad Co. v. Fort, 17 Wall. 553, Judge Davis delivered the opinion in that case, and, as it is very much in point to the case under consideration, we will quote from it at considerable length: "It is apparent, from the findings in the present suit, if the rule of the master's exemption from liability for the negligent conduct of a co-employee in the same service be as broad as is contended for by the plaintiff in error, that it does not apply to such a case as this. This rule proceeds on the theory that the employee, in entering the service of the principal, is presumed to take upon himself the risks incident to the undertaking, among which are to be counted the negligence of fellow-servants in the same employment, and that considerations of public policy require the enforcement of the rule. But this presumption cannot arise where the risk is not within the contract of service, and the servant had no reason to believe he would have to encounter it. If it were otherwise, principals would be released from all obligations to make reparation to an employee in a subordinate position for any injury caused by the wrongful conduct of the person placed over him, whether they were fellow-servants in the same common service or not. Such a doctrine would be subversive of all just ideas of the obligations arising out of the contract of service, and withdraw all protection from the subordinate employees of railroad corporations. These corporations, instead of being required to conduct their business so as not to endanger life, would, so far as this class of persons are concerned, be relieved of all pecuniary responsibility in case they failed to do it. A doctrine that leads to such results is unsupported by reason, and cannot receive our sanction. The injury in this case did not occur while the boy was doing what his father engaged he should do. On the contrary, he was at the time employed in a service outside the contract, and wholly disconnected with it. To work as a helper at a moulding-machine or a common work-hand on the floor of the shop is a very different thing from ascending a ladder resting on a shaft, to adjust displaced machinery, when the shaft was revolving at the rate of 175 to 200 revolutions per minute. The father had the right to presume when he made the contract of service that the company would not expose his son to such a peril. Indeed, it is not possible to conceive that the contract would have been made at all if the father had supposed that his son would have been ordered to do so hazardous a thing. If the order had been given to a person of mature years, who had not engaged to do such work, although enjoined to obey the discretions of his superior, it might with some plausibility be argued that he should have disobeyed, as he must have known that its execution was attended with danger; or at any rate, if he chose to obey, that he took upon himself the risks incident to the service. But this boy occupied a very different position. * * * He was a mere youth without experience, and not familiar with machinery. Not being able to judge for himself, he had a right to rely on the judgment of Collett, and doubtless entered upon the execution of the order without apprehension of danger. Be this as it may, it was a wrongful act on the part of Collett to order a boy of his age and experience to do a thing which in its very nature was perilous, and which any man of ordinary sagacity would know to be so. * * * For the consequences of this hasty action the company are liable either upon the maxim of *respondent superior* or upon the obligations arising out of the contract of service."

In the case of Jones v. Cotton-Mills, 82 Va. 140, the learned judge delivering the opinion of the court said: "In the case at bar, the plaintiff, a boy of thirteen years of age, with little experience and familiarity with machinery, and hired from his father by the defendant company 'to sweep, carry water, and fill the buckets with quills' in the weaving department of its cotton-mills, was ordered into the position of danger already described, by one in the employment of the company, and under the circumstances on that occasion necessarily representing the company. When the injury occurred to this boy, he was not doing the work his father engaged him to do. On the contrary, he was at the time employed in a service outside the contract, and wholly disconnected therewith. To sweep, carry water, and fill buckets with quills is quite a different thing from standing on a ladder, and holding a heavy belt surrounded by the belts of four looms in dangerous proximity to his person, and these belts plying over pulleys, making over a hundred and twenty revolutions per minute. The one is the work of a boy, and within the compass of a boy's strength and experience; the other requires the strength, experience, and judgment of a man, and is a man's work, to say the least. Thus situated, holding up and aiding to adjust a displaced belt that ran a loom in the upper room, the plaintiff received the injury which makes him a comparatively helpless cripple for life. Neither he nor his father, when the contract of service was made, had any ground to expect that he would be called on to encounter any such peril. Eastwood, the second boss, was intrusted with the care, manage-

ment, and repair of the machinery, in connection with the repairs of which this shocking accident occurred. He needed help to mend a broken belt and readjust displaced machinery. There was no one present in the room when the adjustment was to be effected except this boy, the plaintiff in error. Eastwood, by the usage of this company's employees, was not only empowered, but in the nature of things had authority, to call to his assistance this boy, who never for a moment doubted his authority or hesitated to obey. * * * Eastwood was performing a plain duty he owed his principal, and was acting within the scope of his employment. Only four of the seven male hands ordinarily required to run the machinery of the weaving department were on duty that day, the others being absent on leave. In attempting to run the machinery with an insufficient number of hands, Eastwood was compelled, in the course of his regular duty, to call for help. He called this boy, and ordered him into a position of danger, the result of which was irreparable injury to him. In so doing Eastwood was the representative of his principal, and his order, his negligent want of proper care and caution was the negligent order and want of proper care of Eastwood's principal, and liability for the consequences cannot be avoided by the contention that Eastwood had no authority, and should not have given the order. The defendant company is liable on the plain principle of *respondeat superior;* Eastwood being then and there its *alter ego*. Whart. Neg. § 232; Malone v. Hathaway, 64 N. Y. 5. The company is also liable on the ground that by the act of its agent it exposed the boy to perils outside of the ordinary risks incident to his contract of service. Railroad Co. v. Fort, *supra;* Lalor v. Railroad Co., 52 Ill. 401."

We extract the following from the note following Fisk v. Railroad Co., 1 Am. St. Rep. 28 (S. C. 13 Pac. Rep. 144), which we adopt as expressing our views: "Notwithstanding some general declarations to the contrary, which may occasionally be found in the reports, there is no question that the law recognizes some distinction between the duty which a master owes his adult servant or employee, and that which he owes to an employee who, from his youth or inexperience or other mental immaturity or infirmity, is not able, without instructions, to understand the perils to which he is exposed in the course of his employment. This distinction, as near as we can express it, is this: That, as to the latter class of servants, the master must give them full instructions with respect to the dangerous character of the machinery with or about which they are employed, and of the means necessary to be used to avoid those dangers." See Coal Co. v. Young, 20 N. E. Rep. 423 (November term, 1888); Railway Co. v. Frawley, 110 Ind. 18, 9 N. E. Rep. 594. In Jones v. Mining Co., 66 Wis. 268, 28 N. W. Rep. 207, the learned judge delivering the opinion said: "We think it is now clearly settled that if a master employs a servant to do work in a dangerous place, or where the mode of doing the work is dangerous and apparent to a person of capacity and knowledge of the subject, yet if the servant employed to do work of such a dangerous character, or in a dangerous place, from youth, inexperience, ignorance, or want of general capacity, may fail to appreciate the dangers, it is a breach of duty on the part of the master to expose a servant of such character, even with his own consent, to such dangers, unless he first gives him such instructions or cautions as will enable him to comprehend them, and do his work safely, with proper care on his part." That case in its facts is very much like the case we are considering. In Dowling v. Allen, 74 Mo. 13, 41 Am. Rep. 298, the court states its conclusion as follows: "An inexperienced boy of seventeen, employed at work on visibly dangerous machinery, is entitled to warning of the danger from his employer." See Smith v. Car-Works, 60 Mich. 501, 27 N. W. Rep. 662.

There is another class of cases where the master will not be relieved from liability for injuries to his servant who is required to perform dangerous and hazardous work, even though the danger and hazards of the work are open and visible, and warning and instruction given; as when the servant is so young and inexperienced as not to be able to comprehend and guard against the dangers and hazards to which he is exposed. Railway Co. v. Adams, 105 Ind. 151, 5 N. E. Rep. 181. In Hickey v. Taaffe, 105 N. Y. 26, 12 N. E. Rep. 286, the rule is declared to be as follows: "There is no doubt that in putting a person of immature years at work upon machinery which, in some aspects, may be termed dangerous, an employer is bound to give the employee such instructions as will cause him to fully understand and appreciate the difficulties and dangers of his position, and the necessity there is for the exercise of care and caution. Merely going through the form of giving instructions, even if such form included everything requisite to a proper discharge of his duties by such employee, if understood, would not be sufficient. In placing a person of this description at work upon dangerous machinery, such person must understand in fact its dangerous character, and be able to appreciate such dangers, and the consequences of a want of care, before the master will have discharged his whole duty to such an employee." Sullivan v. Manufacturing Co., *supra;* Finnerty v. Prentice, 75 N. Y. 615. But in the opinion from which we have last quoted the court further says: "If a person is so young that, even after full instructions, he wholly fails to understand them, and does not appreciate the dangers arising from a want of care, then he is too young for such employment, and the employer puts or keeps him at such work at his own risk." In Hill v. Gust, 55 Ind. 45, the learned judge who wrote the opinion said: "This exposition of the law is based upon the theory that an employer is bound, under the law, to give a person of tender years, whom he employs, due caution, explanation, and instruction when he sets him to work in a dangerous and hazardous place. That the mere fact that he could have seen that such place was dangerous and hazardous by exercising his faculty of sight is not of itself sufficient evidence to hold an employee accountable for contributory negligence, but that is a question for the jury to determine from all the facts." The mind of an inexperienced boy, who has but reached the immature age of ten years, is incapable of comprehending and guarding against dangers and hazards that attend the coupling of railroad cars, and is without the physical strength required to perform the work successfully, and if directed by his employer, or those under whose direction and command he is placed, to perform such dangerous and hazardous work, and while thus engaged he suffers injury, the employer is liable. See Railway Co. v. Valirius, 56 Ind. 511; Jones v. Cotton-Mills, *supra*.

DECLARATION OF EXPRESS TRUST AND ADMISSIBILITY OF PAROL EVIDENCE TO EXPLAIN DEFECTIVE DECLARATION.

I. Declaration.
  (*a.*) In General.
  (*b.*) Certainty of Expression.
  (*c.*) Illustrations.
II. Admissibility of Parol Evidence to Explain Defective Declaration.
  (*a.*) In General.
  (*b.*) Illustrations.
III. Personalty.

I. *Declaration.* — (*a.*) *In General.* — By the construction which has been given to the seventh section of the English statute of frauds a trust of lands may be still effectually created by parol, provided the evidence by which it is to be "manifested and proved" be in writing, "signed by the party who in law is enabled to declare the trust."[1]

This statute has been incorporated in the laws of most of the States of the Union; however, the language, in some of which, has been somewhat varied. Thus in Illinois "declarations or creations of trusts must be manifested and proved in writing." Similar provisions exist in Massachusetts and Vermont. While in Maine, trusts must be "created and declared in writing." Yet notwithstanding, Perry, the learned author, declares that this variation in language does not produce any substantial difference in the effect of the statutes, for under all of them it will be sufficient if the trust is proved by some writing, although executed after its creation.[2]

(*b.*) *Certainty of Expression.*—While there is no prescribed form of words for a declaration of trust, still it must set forth the objects, terms and conditions and nature of the trust, and be made by the party legally entitled to make it. A complete intention to create a trust, expressed with sufficient clearness, is all that is necessary.[3] Three things must concur to create a trust: (1) sufficient words; (2) a definite subject; and (3) a certain and ascertained object; "and to these requisites may be added another, viz., that the terms of the trust should be sufficiently declared."[4] The declaration must distinctly relate to the subject-matter and must serve to show that there is a trust and what that trust is,[5] as well as sufficiently connect the trustee with the subject-matter of the trust.[6] In other words, the declaration, whether written or oral, must be reasonably certain in its material terms; and the requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interest which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general or equivocal, that any of the necessary elements of the trust is left in real uncertainty, then the trust must fail.[7]

Nor is it necessary that the declaration of trust, or the subsequent acknowledgment of it, be made by deed, will, or other formal written instrument, for if it contains the legal requisites, it will be sufficient, no matter what be the character of the document. A simple letter or memorandum, or any writing of a similar untechnical and informal character, will answer.[8] "It has uniformly been

[1] Tiffany & Bullard on T. & T. p. 355. In Forster v. Hale, 3 Ves. 707, Lord Alvanley said that although it was not necessary that a trust be created in writing, but that "it must be evidenced by writing, and then the statute is complied with, and indeed the great danger of parol declarations, against which the statute was intended to guard, is entirely taken away. I admit it must be proved *in toto*, not only that there was a trust, but what it was." Lord Justice Turner, in Smith v. Mathews, 3 De G. & J. 151, signified approval, as follows: "The construction thus put upon this section of the statute has never, so far as I am aware, been disputed." This latter case also distinguishes Dale v. Hamilton, 2 Phill. 274; and Morton v. Tewart, 2 Young & Coll. 67.

[2] Perry on Trusts, § 81; Bragg v. Paulk, 42 Me. 502; Sims v. Howard, 4 Nev. 482; 1 Green. on Ev. § 266; Wood on Frauds, p. 802, § 447; Lewin on Trusts (8th ed.), p. 55. This distinction between "creating" and "manifesting and proving" a trust is of practical importance, because a subsequent written acknowledgment of it will cause the interest to relate back to the date of its original creation, so as to bring it (for example) within the operation of a will of the *cestui que trust* executed before the written acknowledgment, but after the verbal creation. Bispham's Prin. of Eq. pp. 72, 73.

[3] Reed on the Stat. of Frauds, § 841; Abbott's Trial Ev. p. 233, par, 1; 1 Perry on Trusts, § 82.

[4] Bispham's Prin. of Eq. p. 74; Crunways v. Coleman, 9 Ves. Jr. 323.

[5] Browne's Stat. of Fr. § 108, p. 117; Forster v. Hale, 2 Ves. Jr. 308; Movan v. Hays, 1 John. Ch. (N. Y.) 339; Urann v. Coats, 109 Mass. 581; Smith v. Mathews, 3 De G. & J. 151.

[6] Hill on Tr. (Am. Notes), pp. 99, 100; Lewin on Trusts (8th ed.), p. 56; Crook v. Brooking, 2 Vernon, 50.

[7] 2 Pomeroy's Eq. Jur. § 1009; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; Dillaye v. Greenough, 45 N. Y. 438.

[8] Tiffany & Bullard on T. & T. p. 355; Hill on Tr

held that letters under the hand of the trustee distinctly referring to the trust, are sufficient as manifestations or proofs to satisfy the statute."[9] And such letters or memoranda, although they are long posterior to the transaction and date, provided that they be otherwise complete, will be sufficient.[10] So, *a fortiori*, an admission in an answer in chancery, has therefore been deemed sufficient to satisfy the statute.[11] So a promissory note,[12] or a receipt are sufficient.[13]

A few cases seem to indicate that letters addressed to others than the *cestuis que trust* or equitable claimants are less valuable as evidence,[14] but, on the other hand, it is held that the beneficiary need not necessarily be a party to the declaration;[15] that a letter unequivocally declaring the existence of a trust will answer the requirements of the statute, whether addressed to the *cestui que trust* or to a third person.[16] Thus in Bates v. Hurd,[17] it is said: "A letter memorandum or recital subscribed by the trustee, whether addressed to, or deposited with the *cestui que trust* or not, or whether intended when made to be evidence of the trust or not, will be sufficient to establish the trust when the subject, object and the nature of the trust, and the parties and their relations to it and each other, appear with reasonable certainty."

(*c.*) *Illustrations.*—A few illustrations will be given. In Rutledge v. Smith,[18] a voluntary written acknowledgment by an executor of a trust created by parol was held a lien upon the estate of the testator, conveyed by the executor to a voluntary purchaser with notice. The writing declared that "there is due to her grandson, H. R. the sum of $—— on account of the legacies left him by his grandfather, T. S., and promises that the same, together with interest to grow due thereon from this day, shall be paid to him by her executors, out of whatever estate she shall die possessed of or be entitled unto, in preference to any other claim thereon, within one year of the date of her death, unless it should be previously paid by her." The court said: "It is not a debt created by her promise; but it is an acknowledgment of a pre-existing debt. * * * It is not to be sure a declaration in so many words that she was a trustee; but it is an acknowledgment of fact which admits of no other conclusion. For if she was indebted to him a legacy left him by his grandfather, then she was a trustee for the purpose of carrying that will into effect." In Strickland v. Aldridge,[19] the lord chancellor went so far as to compel the defendant, to whom property had been devised absolutely, to discover whether the devise had been coupled with a secret parol trust that he would hold the property for a particular purpose not expressed in the will. Here it was said: "If a father devises to his youngest son, who promises if the estate is devised to him he will pay ten thousand pounds to the eldest son, this court would compel the former to disclose whether that passed in parol, and if he acknowledged it, even paying the benefit of the statute, he would be a trustee to the amount of ten thousand pounds."

But where the writing is silent as to the person to be beneficially interested in the trust, the declaration is insufficient. Thus, an antenuptial contract, whereby the husband was appointed trustee of real estate and personal property, and as such trustee was to have the entire and sole management, direction and control thereof, which failed to mention a beneficiary, was refused execution as a trust; the court remarking that "every agreement which is by the statute of frauds required to be in writing must be certain in itself, or capable of being made so by reference to something else whereby the terms can be ascertained with reasonable precision, or it cannot be carried into effect."[20] But the contrary has also been held.[21] So, loose and

(Am. Notes), pp. 99, 100; Lewin on Trusts (8th ed.), p. 56.

[9] Browne on the Stat. Fr. § 108, p. 117; Rutledge v. Smith, 1 McCord Ch. (S. C.) 119; Childers v. Childers, 1 De G. & J. 482; Morton v. Tewart, 2 Young & Coll. 67. See Kronheim v. Johnson, 26 W. R. 142; Linton v. Wikoff, 17 La. Ann. 878.

[10] 2 Reed's Stat. of Fr. § 842; Bispham's Prin. of Eq. p. 73.

[11] 1 Green. on Ev. § 266.

[12] Morton v. Tewart, 2 Young & Coll. 67; Bellanny v. Burrow, Cas. Temp. Talb. 97.

[13] Miller v. Antle, 2 Bush, 409.

[14] Steere v. Steere, 5 Johns. Ch. (N. Y.) 12; O'Hara v. O'Neil, 2 Bro. P. C. 39; Forster v. Hale, 3 Ves. 696.

[15] Dale v. Hamilton, 2 Phill. 274.

[16] Abbott's Trial Ev. p. 233.

[17] 65 Maine, 181.

[18] 1 McCord Ch. (S. C.) 119.

[19] 9 Ves. 526.

[20] Dillaye v. Greenough, 45 N. Y. 438.

[21] R. R. v. Durant, 95 U. S. 576; Pring v. Pring, 2 Vern. 99.

general declarations of intention, by one member of a family, of holding property in trust for the other members, are not sufficient for the deduction of a trust which equity will recognize and enforce. Thus, certain letters addressed by the party sought to be charged with the trust to his brother were held insufficient to establish a trust, as the court considered that the letters evidently referred to private and confidential business.[22] But a secret parol trust specifically referred to by one executor in writing to another, constitutes a sufficient "manifestation in writing."[23] In Day v. Roth,[24] the alleged trustee had in his hands certain sums of money, recently received from the plaintiff, to whom he wrote a letter containing an admission that he held the money for investment on plaintiff's account, and asking for power of attorney respecting the funds, which was sent to him. The letter read: "When you sign the enclose paper (referring to the power of attorney which was enclosed) and return it to me, I shall invest your money. My intention is to make up the sum of 3000 pounds, and purchase a building known as the U. M. (the property sought to be charged with the trust) which gives a good income of 300 pounds per year, and in ten years the property will be worth double what it is now. All this will be settled on you." It did not otherwise appear upon what understanding he had received the money. He afterwards invested the money in the U. M. property, and the conveyance was taken in the name of his brother. The letter was held to be a sufficient declaration to establish a trust against both him and his brother.[25]

II. *Admissibility of Parol Evidence to Explain Defective Declaration.*—(*a.*) *In General.*—But the most difficult question respecting the subject under consideration is as to the admissibility of parol evidence to help out or explain a defective or incomplete declaration of trust. That resulting trusts may be manifested and proved by parol is a well known rule and admits of no controversy. So apart from the statute of frauds express trust may be so manifested and proved,[26] but it is stated, as a general principle, that where an express trust cannot be created by parol, oral evidence is not admissible to corroborate a writing evidencing the trust.[27] And while, as above shown, some statutes expressly provide that the trust must be "created and declared in writing," others that it is sufficient if it be "manifested and proved in writing," and that these statutes are substantially the same as to their requirements; and while there is much apparent discord in the decisions, doubtless resulting from the variation of the statutory language, still it is believed that a proper construction will admit of parol evidence, to explain a defective written declaration. But how far parol evidence is admissible is extremely difficult under the decisions to determine. It must be borne in mind that parol evidence is admissible only to explain ambiguties in the written declaration, and not admissible to supply omissions in it. That is to say, where the written evidence clearly establishes the existence of a trust, parol evidence of words referred to in it is admissible for the purpose of describing or defining what was meant by the writing, and as showing the full truth connected with it.[28] But if the writing is clear and positive as to the terms, etc., of the trust, it cannot be explained by parol, but if loose and ambiguous, parol evidence is competent to show what the understanding was.[29] Thus, parol evidence is admissible to show the position in which the writer of letters stood when he wrote them, the circumstances by which to his knowledge he was then surrounded and the degree of weight and credit which independently of any question of construction, may belong to the letters.[30]

And in cases where an express trust is permitted to be proved by parol, such evidence must be of the highest degree; and great caution is taken that the proof be strong, clear, unequivocal and positive.[31] Some decisions say that the proof must be

[22] Steere v. Steere, 5 Johns. Ch. (N. Y.) 1.
[23] Crook v. Brooking, 2 Vernon, 50.
[24] 18 N. Y. 448.
[25] See Morton v. Tewart, 2 Young & Coll. 67.
[26] 2 Reed on Stat. of Fr. §§ 833, 852, 856.
[27] 2 Reed on Stat. of Fr. § 835; Abbott's Trial Ev. p. 233; Cook v. Barr, 44 N. Y. 159.
[28] Bispham's Prin. of Eq. p. 74; 2 Pomeroy's Eq. Jur. 1009; Forster v. Hale, 3 Ves. 707; Dillaye v. Greenough, 45 N. Y. 438; Steere v. Steere, 5 Johns. Ch. (N. Y.) 1; Crook v. Brookings, 2 Vernon, 50; Cook v. Barr, 44 N. Y. 161; Green v. Gates, 73 Mo. 115.
[29] Abbott's Trial Ev. p. 234; Hale v. Everett, 53 N. H. 9, 16 Am. Rep. 82; Happy v. Morton, 33 Ill. 398, 433; 2 Reed on Stat. of Fr. § 848.
[30] Wood on Frauds, p. 803, § 449.
[31] Reed on Stat. of Fr. § 838.

well nigh conclusive and exclude every other reasonable theory as to the question of the existence of the trust and the terms—subject and object — thereof; mere performance is regarded as insufficient;[32] and that the beneficiary cannot establish by his testimony a trust in his favor in property, the title of which is in another.[33]

(*h.*) *Illustrations.*—A few illustrative cases will be given. In Railroad v. Durant,[34] there was a conveyance of real estate to the grantee as "trustee," which failed to state for whom and what purpose. Parol evidence was held admissible to explain the defects. Likewise in Pring v. Pring,[35] a will declared that the executors were only in trust, but it omitted to mention for whom. Two of the executors admitted the trust in their answer, but the other denied it. Parol evidence was admitted to establish that the testator's intention was to declare a trust for his wife.[36] So, parol evidence has been received to identify land described in a letter as "Enfield Property," where the writing sufficiently referred to the parties.[37] So, property described in a memorandum as "a house of Church Street" has been identified by oral evidence;[38] so "a house and lot of land situated on Amity Street."[39] In Steere v. Steere,[40] the question was whether parol evidence was admissible to contradict the inference drawn by plaintiff from accounts and letters. The court, per Kent, J., said: "If the written proof was clear and positive, it could not be rebutted by parol proof; but considering the loose and ambiguous nature of it, I am inclined to think that parol evidence is competent in support of the sheriff's deed (under which the alleged trustee took the property), and to explain the obscurity of the case, by showing what was the understanding of all the parties concerned."[41] In Kingsbury v. Burnside,[42] the letter stated: "I spent all morning with B yesterday. He stated, as I told you, that S had made over the Chicago property that was held in his name to me. A new power of attorney is therefore necessary for you and myself. We made it out, I signed it; B will send it to you. I send you a copy for your own keeping, and keep one myself." The power of attorney was to B "to transact and conduct the business of the Kingsbury estate at Chicago" (the property in question), which was regarded as a part of the letter. The letter was held to be a sufficient manifestation in writing, within the statute of frauds, to establish a trust in the grantee, and it was considered in connection with a will, devising the property.[43]

III. *Personalty.* — The statute of frauds only affecting real estate, an express trust in personalty may be created and proved by parol;[44] yet there are cases which deny this.[45]

[32] Chace v. Chapin, 130 Mass. 130; Christman v. Christman, 23 Mich. 228; Allen v. Withrow, 110 U. S. 129; Barclay v. Lane, 6 Bush (Ky.), 587; Lantry v. Lantry, 51 Ill. 466; Kennedy v. Kennedy, 57 Mo. 73; Ringo v. Richardson, 53 Mo. 385; Forrester v. Moore, 77 Mo. 651; Shaw v. Shaw, 86 Mo. 597; Hill on Tr. 48, 49. See Miller v. Stockely, 5 Ohio St. 194; Stall v. Cincinnati, 16 Ohio St. 169; Hubbell v. Hubbell, 22 Ohio St. 208; Mathews v. Leaman, 24 Ohio St. 615; Broadrup v. Woodman, 27 Ohio St. 553; Watson v. Erb, 33 Ohio St. 50; Harvey v. Gardner, 41 Ohio St. 642.

[33] Hill on Tr. 60; Fordyce v. Willis, 3 Bro. C. C. 581; Strode v. Winchester, 1 Dick. 397. Earl, C., in Cook v. Barr, 44 N. Y. 161, said that parol evidence "cannot be resorted to, to help out the proof furnished by the writing (alleged admission in pleading of trust.) The writing must show that there is a trust and what it is, and failing in this it is unsufficient. In 1 Hilliard on Real Prop. (4th ed.) 425, it is said 'a trust cannot be established by parol evidence, when this goes to confirm other written evidence.' In 1 Greanleaf's Cruise of Real Prop. 356, in a note, it is said that 'the evidence must all be in writing without resorting to parol evidence, even to connect different writings. Greenleaf, in his work on Evidence (vol. 1, § 268), says that verbal testimony is not admissible to supply any defects or omissions in the written evidence; for the policy of the law is to prevent fraud or perjury by taking all the enumerated transactions entirely out of the reach of any verbal testimony whatever.'" But it is proper to remark that this case is not in harmony with the general current of authority.

[34] 95 U. S. (5 Otto) 576.

[35] 2 Vern. 99.

[36] Compare this and the preceding case with Dillaye v. Greenough, 45 N. Y. 438.

[37] Packard v. Putnam, 57 N. H. 43. This is a case of a resulting trust, but classified and cited as an express trust case: Moore v. Pickett, 62 Ill. 158.

[38] Mead v. Parker, 115 Mass. 413.

[39] Hurley v. Brown, 98 Mass. 545. See Baker v. Hathaway, 5 Allen, 103; Farwell v. Mather, 10 Allen, 322; Putnam v. Bond, 100 Mass. 58; Stoops v. Smith, 100 Mass. 63; Greenl. Ev. §§ 286, 288.

[40] 5 Johns. Ch. (N. Y.) 18.

[41] See Redington v. Redington, 3 Ridgeway's Cases (Irish Par.), 182.

[42] 58 Ill. 310.

[43] Tawney v. Crowthers, 3 Bro. Ch. R. 151, 318; Johnson v. Ronalds, 4 Mumf. (Va.) 77; Roberts on Frauds, 101, 102.

[44] Bispham's Prin. of Eq. p. 73; Wood on Frauds, p. 799, § 440; Lewin on Trusts (8th ed.), p. 53; 2 Reed on Stat. of Frauds, § 587; Cobb v. Knight, 74 Me. 253; Chace v. Chapman, 130 Mass. 128; Weaver v. Savings Bank, 17 Abb. (N. Y.) N. C. 82; Ray v. Simmons, 1 Law & Eq. Rep. 66.

[45] Fuselier v. Fuselier, 5 La. An. 132; Taylor v

Still any declaration, however informal, which evinces an intention with sufficient clearness to create a trust in personalty, will have this effect.[45] The proof of express trusts in personalty may be either wholly by parol or in writing, or partly by both.[47] Yet the evidence must be certain, positive and unequivocal, and statements of mere intention are cautiously regarded.[41]

EUGENE MCQUILLIN.

Mayrant, 4 Desaus. 505. See Brabrook v. Savings Bank, 104 Mass. 228; Kirkpatrick v. Davidson 2 Ga. 299.

[46] Abbott's Trial Ev. p. 234, n. 8; Chew v. Brumage, 13 Wall. 497.

[47] Porter v. Bank, 19 Vt. 419.

[48] Crissman v. Crissman, 23 Mich. 218; Dipple v. Corles, 11 Hare, 184; Barkley v. Lane, 6 Bush (Ky.), 589; Maguire v. Dodd, 9 Ir. Ch. 456.

INFANCY—TORTS—FALSE REPRESENTATIONS.

NASH V. JEWETT.

Supreme Court of Vermont, June 27, 1889.

Infancy is a good plea to an action *ex delicto* for falsely representing that defendant was of full age whereby plaintiff was induced to contract with him.

TYLER, J.: The plaintiff brings this action against the defendant to recover the damages which he claims to have sustained in consequence of the defendant having falsely and fraudulently represented to him that he was of the full age twenty-one years, whereby the plaintiff was induced to sell the defendant certain goods and merchandise, and to take his promissory note therefor. The defendant pleads infancy, and the case comes to this court on demurrer to the plea. Cases involving substantially the same question that is here presented have been decided by this court, and a full review of the authorities is unnecessary. It was held in West v. Moore, 14 Vt. 447, and Morrill v. Aden, 19 Vt. 505, that to an action on the case for a false and deceitful warranty of a horse, infancy was a good defense, and in Gilson v. Spear, 38 Vt. 315, that an infant was liable in an action *ex delicto* for an actual and willful fraud only in cases in which the form of action did not suppose that a contract existed; but, where the *gravamen* of the fraud consisted in a transaction that really originated in contract, the plea of infancy was a good defense. In Doran v. Smith, 49 Vt. 353, the defendant falsely and fraudulently represented that he was the owner of certain property, and had good right to sell the same, and the plaintiff, confiding in such representations, bought the property, and paid the defendant therefor. The property was not in fact the defendant's, and the plaintiff was compelled to surrender it to the true owner, yet a plea of infancy to the declaration in case was held good on demurrer. The plaintiff's counsel insist that a legal distinction can be drawn between the above cases and the one at bar in that in the present case the false and fraudulent representation was antecedent to, and disconnected with, the contract, although it was the inducement to it.

While it is true, as a general proposition of law, that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*. A reference to the declaration in the case shows that the representations made by the defendant as to his age, using the concise language of Chief Justice Pierpoint in Doran v. Smith, *supra*, "enter into and constitute an element of the contract itself; it is that that makes them actionable. The contract must be alleged and proved or there can be no recovery. The contract is the basis of the action. The fraud is predicated upon the contract." Benjamin in his work on Sales, p. 22, lays down the general rule that an action at law will not lie against an infant for fraudulently representing himself of full age, and thereby inducing the plaintiff to contract with him, and cites many authorities in support of the rule; but in his notes on page 442 he says that an infant may be held liable for a false statement as to his age if he afterwards successfully refuses to pay on the ground of infancy. The decision in Fitts v. Hall, 9 N. H. 441, which is referred to approvingly by Redfield, J., in Towne v. Wiley, 23 Vt. 355, is relied upon by the plaintiff's counsel in this case; but that decision was not an authority in point in Towne v. Wiley. In that familiar case an infant, who had hired a horse of a livery stable keeper to drive to an agreed place twenty-three miles distant, returned by a circuitous route nearly double that distance, left the horse standing out of doors during the night, and it died from overdriving and exposure. It was held that the infant was liable in trover for a conversion of the property by departing from the object of the bailment, the same as if he had taken it in the first instance without permission. In his opinion in that case Judge Redfield said: "In all the cases, then, upon this subject, it will be found, that the courts profess to hold infants liable for positive substantial torts, but not for violations of contract merely, although, by construction, the party claiming redress may be allowed, by the general rules of pleading, to declare in tort, or contract, at his election." In Fitts v. Hall, the infant had rescinded the contract by which goods had been sold to him, and his note taken therefor on the false representation that he was of age, and had refused, on demand, to return the property. Parker, C. J., who delivered the opinion, said in the subsequent case of Burley v. Russell, 10 N. H. 184: "That decision is that an infant is liable in case for a fraudulent affirmation that he is of age, whereby another is induced to enter into a con-

tract with him, if he afterwards avoids the contract by reason of his infancy."

We think no distinction in principle can be drawn between this case and former cases referred to, decided by the court, and the judgment of the county court is affirmed.

NOTE. — The principal case involves a question wherein there has been much diversity of decision in the courts. On one side the effort has been to protect minors from their contracts, since the law considers that they have not sufficient knowledge and discretion to be so bound. On the other side the desire has been to protect innocent parties from the frauds of minors. When it is apparent that the party is a minor, or where his majority is evidenced only by his word, the courts in some cases have shown a disinclination to protect the other party to the contract, when the minor pleads his infancy.[1]

Repudiation of Contract.—An infant may repudiate his contracts relative to personalty during his minority,[2] but where realty is concerned he cannot act till he attains his majority.[3] When he disaffirms his contract, it is avoided *ab initio*.[4]

Liability of Infant.—In case the infant has disaffirmed the contract by pleading infancy or otherwise, he cannot be sued on it. When he has induced the other party to contract with him by representations that he was of age, or by other false representations, can he escape all liability by pleading his minority? Though an infant is in many cases liable for his torts, yet he is not liable when such tort is connected with a contract, and the result of a judgment in tort would be to indirectly enforce the contract.[5] If the tort or fraud arises from breach of contract, although there were false representations or concealments respecting the subject-matter thereof, he cannot be charged for breach of his promise or contract.[6] As elsewhere said, an action *ex delicto* for an actual or wilful fraud can be maintained only in cares where the form of action does not suppose that a contract has existed. When the gravamen of the fraud consists in a transaction, which really originated in contract, the plea of infancy is a good defense.[7] However, it is immaterial whether the action is *ex contractu* or *ex delicto;* the question is decided upon the real facts of the case.[8] If the tort was subsequent to the contract, and not a mere breach of it, but a distinct, wilful and positive wrong of itself, the infant is liable, although the tort may be connected with a contract.[9] Where a minor represented that he was of age, and thereby inducee another to sell him goods on time, it was held that such representations were prior to the contract and not a part thereof, and the minor was liable for the damages sustained thereby.[10] This last decision has been declared to be contrary to all the English and most of the American decisions.[11] Such actions have generally been in trover, *detinue* or on the case. Only the actual loss sustained can be recovered.[12] It only remains to call attention to some of the conflicting decisions. An action was held not to lie against A for falsely representing himself to be of full age, whereby plaintiff was induced to contract with him.[13] An infant was sued for deceit in selling the plaintiff a horse which he represented to be sound, when he knew it was not so. The defendant pleaded infancy. One court held that the infant was not liable,[14] while in a similar case another court held that he was liable. A minor hired a horse, and drove it to an additional place to the one mentioned by him when he hired it. He returned it injured. It was held that trover was sustainable against him, notwithstanding his plea of infancy.[16] An infant was held not liable for the breach of warranty in the sale of a horse.[17] Where a minor sold property to another, representing falsely that he was the owner thereof, it was held that the vendee had no right of action against him, since the contract would be involved therein.[18] In England, such contracts have been upheld against minors in some cases in equity, where they were not sustainable at law,[19] and it was claimed they were enforceable where the distinctions between law and equity had been abolished.[20] It has been urged that infants who have obtained contracts by false representations as to their ages, should be estopped to plead the contrary, but the courts hold that such legal disabilities cannot be removed by representations.[21] In New York, where minors are liable criminally for obtaining goods by false representations as to their ages,[22] one court holds that in such cases actions in tort are maintainable to recover such property back, or to recover the damages sustained, and that the weight of authority is to that effect.[23] We think, however, that on this very vexed question the weight of authority is with the principal case.

S. S. MERRILL.

1 Rice v. Boyer, 108 Ind. 472; Kilgore v. Jordan, 17 Tex. 341.

2 Sims v. Everhardt, 102 U. S. 300; Willis v. Twambly, 13 Mass. 204; Hoyt v. Wilkinson, 57 Vt. 404; House v. Alexander, 105 Ind. 109; Briggs v. McCabe, 27 Ind. 327.

3 Stafford v. Roof, 9 Cow. 626; Sims v. Everhardt, *supra.*

4 Mustard v. Wohiford. 15 Gratt. 329; Hoyt v. Wilkinson, 57 Vt. 404.

5 Cooley on Torts, 107, 112.

6 Fitts v. Hall, 9 N. H. 441.

7 Gibson v. Spear, 38 Vt. 311.

8 Gibson v. Spear, *supra;* Custin v. Patton, 11 Serg. & R. 309; Norris v. Vance, 3 Rich. 164.

9 Fitts v. Hall, *supra.*

10 Fitts v. Hall, *supra.*

11 Gilson v. Spear, *supra.*

12 Rice v. Boyer, 108 Ind. 472.

13 Liverpool, etc. Assn. v. Fairhurst, 9 Exch. 422.

14 Green v. Greenplank, 2 Marsh. (Eng.) 485.

15 Wood v. Vance, 1 Nott & Mc. 197.

16 Homer v. Thwing, 3 Pick. 492.

17 Howlett v. Haswell, 4 Camp. 118.

18 Doran v. Smith, 49 Vt. 351.

19 *Ex parte* Unity, etc. Assn., 3 DeGex & J. 63.

20 Kilgore v. Jordan, 17 Tex. 341.

21 Carpenter v. Carpenter, 45 Ind. 142; Sims v. Everhardt. *supra.*

22 People v. Kendall, 25 Wend. 399.

23 Eckstein v. Frank, 1 Daly, 334; Schunemann v. Paradise, 46 How. Pr. 426.

CORRESPONDENCE.

To the Editor of the Central Law Journal:

In the issue of the Journal for Sept. 20, 1889, in the course of the article on Suicide occurs the following, after speaking of the New York statute making it a crime to attempt self-destruction: "No other State in the Union, so far as we know, and no State in continental Europe, prohibits attempt at self-murder." Section 6436, Compiled Laws of Dakota, 1887, reads as follows: "Every person guilty of attempting suicide, or of aiding attempt at suicide, is punishable by imprisonment in the territorial prison not exceeding two years, or by a fine not exceeding one thousand dollars, or both.

M. C. HARPER.

Lisbon, N. Dak.

JETSAM AND FLOTSAM.

THE SEARCH FOR EVIDENCE.—The eagerness of the modern practitioner to secure his evidence is curiously illustrated in the Cronin case in Chicago. It seems that the owner of the cottage where the alleged crime took place very soon found a pecuniary value in its possession, by reason of the public desire to inspect the scene; and the cottage became "a museum of limited curiosities." The prosecution obtained specimens of the blood stains, and some of the articles that were in the cottage, such as the basin and trunk, in order to use them for the purposes of evidence, but they refused to allow the lawers for the defense to use these things also. The lawyers engaged for the defense, it is said, then entered the house and, without the owner's consent, took away sufficient specimens of the blood-stained wood to serve the purposes of an analysis in preparation for trial.

It is now reported that on the application of the defense the trial court has directed that the defense should have access to these articles, and that experts for the defense be allowed to examine and test them in the presence of the expert for the State.

THIS decision agrees with the principle recognized by Surrogate Ransom in the novel decision made by him in Monroe's Estate (23 Abb. N. C. 83) as to photographing the adversary's evidence. The points there decided were as follows:

1. The court may require the proponent of a will to allow a contestant who questions its genuineness to take a photograph of it; and in the case at bar, where an alleged will, the genuineness of which was contested, was executed in triplicate, the court, on application of a contestant, ordered that two of the three parts should be filed pending the contest.

2. The court have power to require the proponement of a will, the genuineness of which is contested, to allow it to be subjected to chemical tests for the purpose of disclosing the nature and composition of the ink, and what processes it may have been subjected to.—*N. Y. Register.*

POLICE OFFICERS IN NEBRASKA.—Police officers must be looked upon by the citizens of Nebraska as public enemies, if we are to judge by the phraseology of a bill recently passed by the Nebraska legislature which provides: "It shall be unlawful for any person to fire off or discharge any pistol, revolver, shot-gun, rifle, or any fire-arms whatsoever, on any public road or highway, in any county of the State of Nebraska, or within sixty yards of such public road or highway, except to destroy some wild, ferocious, and dangerous beast, *or an officer in the discharge of his duty.*"

THE constitution of the new State of Washington contains a provision by which the legislature is authorized to establish a jury of less than twelve men in the lower courts, and to provide that nine or more jurors may render verdicts in civil cases. This new departure will be watched with general interest; and if it shall prove to work well it will undoubtedly be copied by many of the other States.

RECENT PUBLICATIONS.

A BRIEF on The modes of Proving the Facts Most frequently in issue or Collaterally in question on The Trial of Civil or Criminal Cases. By Austin Abbott of the New York Bar. Diossy & Co. New York.

The series of volumes, of which this is the latest, are unique and novel, to say the least. There is nothing like them, in the literature of the law, on this side of the Atlantic. And that is saying a great deal for these days when text-books on every conceivable topic are as thick as the traditional leaves in Vallombrosa. The author's first venture, in this domain of the law, resulted in what is known as a brief for the trial of Civil Issues, which met with immediate and deserved success. Though containing nothing of original value, the practitioner found collected, within its pages, the authorities bearing on the question as to the necessary proofs under every particular issue in civil actions. A brief for the trial of Criminal Cases, which made its appearance but a few months ago, was intended for similar use by the criminal law practitioner.

The present volume is designed to point out the modes of proving the facts most frequently in issue in both civil and criminal cases. Its value to the everyday practitioner can be seen at a glance. It enables one, without the advantage of a library at hand, to know in what way he will be enabled to prove the facts upon which his action depends, and it gives to him, who has not found time for careful preparation, a clear view of the pathway which lies before him in the development of his cause of action. To get in legal evidence and to keep out illegal evidence of the adversary is the great art of trying causes; and the policy of counsel is to choose among various modes of proof, that evidence which is competent, either of right or in the discretion of the judges, prudent in the face of the adversary, and likely to be not only effective now, but safe in case of appeal.

The book contains over three hundred pages, is well printed and completely indexed.

BOOKS RECEIVED.

A TREATISE on the Law of the Domestic Relations embracing Husband and Wife, Parent and Child, Guardian and Ward, Infancy, and Master and Servant. By James Schouler, Lecturer in the Boston University Law School, and Author of Treatises on the "Law of Personal Property" "Bailments including Carriers," etc. Fourth Edition. Boston. Little, Brown & Co. 1889.

THE STATUTE OF LIMITATIONS AND ADVERSE POSSESSION with an Appendix containing The English Acts of Limitation. By Henry F. Buswell, Author of the Law of Insanity and Editor of Taylor's Landlord and Tenant, etc. Boston. Little Brown & Company. 1889.

A TREATISE ON THE LAW RELATING to Executors and Administrators. By Simon G. Croswell, Editor of Greanleaf on Evidence, Washburn on Real Property, Washburn on Easement and Servitudes, and Author of a Collection of Patent Cases. Boston. Little, Brown & Company. 1889.

A TREATISE ON FRAUDULENT CONVEYANCES AND CREDITOR'S BILLS with a discussion of Void and Voidable Acts. By Frederick S. Wait, of the New York Bar, Author of "Insolvent Corporations," "Trial of Title to Land." Second Edition Revised and Enlarged. New York: Baker, Voorlins & Co., Law Publishers. 66 Nassau. St. 1889.

TACT IN COURT, containing Sketches of Cases won by Skill, Wit, Art, Tact, Courage and Eloquence with Practical Illustrations in Letters of Lawyers, giving their best rules for winning cases. Fourth Revised and Enlarged Edition. By J. W. Donovan. Rochester, N. Y.: Williamson Law Book Company. 1889.

QUERIES AND ANSWERS.

[*Subscribers are invited to send short answers to the following.*]

QUERY No. 14.

A mortgages his personal property in the State of Kansas to B. Both A and B are residents of the State of Kansas and the personal property at the time of giving mortgage was in Kansas. Said mortgage was issued according to the laws of Kansas and filed according to law of that State. A gave his consent for B to remove the property into the State of Missouri, where debts were made and the property was attached by the Missouri creditor. Said mortgage not recorded in the State of Missouri. Will the attaching creditor's attachment hold good against the mortgagee? Give authority. M. & G.

HUMORS OF THE LAW.

"I will ask you to state," said the lawyer, "whether you have any other children than this young man now on trial for stealing?"

"Your Honor," exclaimed the witness, appealing to the judge, "do I have to answer that question?"

"I see no reason why you should not," answered the judge. "You may answer it."

"I have one other child, but I had hoped it would not be necessary to speak of her. She turned out badly," faltered the witness. "She married a lawyer."

"No," said the bank cashier, "I didn't need the money. I wasn't speculating. I had no necessity for stealing it. But, hang it, I didn't want to be called eccentric."

A negro who was giving evidence in a Georgia court, was reminded by the judge that he was to tell the whole truth.

"Well, yer see, boss," said the dusky witness, "I'se skeered to tell de whole truth for fear I might tell a lie."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ACCIDENT INSURANCE—Verdict.—In an action in the federal court on an accident insurance policy, for the death of the policy-holder, alleged to have been accidentally caused in a certain manner, refusal to submit to a special verdict as to whether the death was caused in that manner is not error, though the submission of special verdicts on request is required by the rules of practice in the State where the court is held, as such refusal is neither pleading, practice, nor form or mode of proceeding, within Rev. St. U. S. § 914, providing that the practice, pleadings, and forms and modes of proceeding in the federal courts shall conform as near as may be to those existing in the courts of the State wherein such federal courts are held. — *United States Mut. Acc. Ass'n. v. Barry*, (U. S. S. C.) 9 S. C. Rep. 755.

2. ADMINISTRATOR—Sale. — An administrator's sale is not a judicial sale, nor an official sale, and a defaulting purchaser of lands sold by an administrator is not liable in Rhode Island, on an implied contract, for the deficiency arising from a resale, there being no statute creating such liability. — *McGinness v. Whaler*, R. I., 18 Atl. Rep. 158.

3. ADMIRALTY—Collision.—In fog so thick that vessels cannot be seen within a quarter of a mile of each other, when fog signals are heard almost ahead and near, (in this case within three quarters of a mile,) steamers proceeding at about full speed are bound at once to stop and reverse, and not to change their course without knowing the position or direction of the other. — *The Britannic*, (U. S. D. C.) N. Y., 39 Fed. Rep. 395.

4. ADMIRALTY—Shipping.—Upon a bill of lading issued by a chartered vessel, making the goods deliverable to order, the bill of lading itself is the only contract between the ship and a *bona fide* purchaser and indor who accepts the goods under the bill of lading, without knowledge or notice of the charter; and if he detains the ship in receiving the goods, and the bill of lading specifies no rate of demurrage, nor refers to the charter, the ship can recover only according to the value of her use, and not an amount in excess thereof specified in the charter, though the charterer was the shipper of the goods.—*The Pietro G.*, (U. S. D. C.) N. Y., 39 Fed. Rep. 369.

5. APPEAL—Certificate of Division.— Defendants were indicted in three counts for conspiracy to defraud the United States. To each count a demurrer setting up thirty grounds for its support was filed. After argument the judges certified seven questions as to each count on which they differed in opinion which could not be decided without determining whether under the facts defendants were liable to indictment: *Held*, not to present such a difficult question of law as to admit its certification to the supreme court.— *United States v. Perrin*, (U. S. S. C.) 9 S. C. Rep. 681.

6. APPEAL— Notice. — Code Wash. Ter. § 2140, providing that when a party to an action has appeared in the same he shall be entitled to at least three days' written notice of any application to be made therein, does not apply to a notice of appeal given in accordance with the act of 1883, within the time allowed by law, as the allowance of such appeal is of course.—*Ex parte Parker*, (U. S. S. C.) 9 S. C. Rep. 708.

7. APPEAL—Supersedeas. — On application for *supersedeas*, in appeal from the interlocutory order or decree, the judge or justice is not required to satisfy his mind on litigated questions, but to see, from an inspection of the record, that there is an appeal; that it is not frivolous; and that the state of the case as to its future course is such as to render a stay of proceedings proper. Modifying Saxon v. Gamble, 23 Fla. 413. — *Williams v. Hilton*, Fla., 6 South. Rep. 452.

8. APPEAL—Supersedeas.— Where litigation in the superior court involves resistance to a levy made upon property under execution, merely taking the case to the supreme court by writ of error after judgment or decree for the plaintiff, without giving bond or making affidavit, is no obstacle to proceeding with the levy while the case is pending in the supreme court, or before the *remittitur* is returned to the court below. A *supersedeas* does not result from the pendency of a wr

of error alone, but from the bond or affidavit provided for by § 4263 of the Code — *Cummings v. Clegg*, Ga., 9 S. E. Rep. 1042.

9. APPEALABLE ORDERS.— An order reviving a suit in the name of one as executor of the deceased plaintiff for whom a decree was rendered, and investing the substituted plaintiff with all the rights of the original plaintiff to enforce the decree, is appealable. — *Terry v. Sharon*, (U. S. S. C.) 9 S. C. Rep. 705.

10. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Failure to schedule, in deed of assignment, money in bank upon which check had previously been drawn but not paid, will not *per se* avoid the assignment. — *Stultz v. Fleming*, Ga., 9 S. E. Rep. 1067.

11. ASSIGNMENT FOR BENEFIT OF CREDITORS. — Under Gen. St. 1878, ch. 41, § 25, an assignee for the benefit of creditors may formally accept the trust, and take possession of the assigned property before the execution of his bond, but he cannot dispose of any part of it until the filing of such bond; and upon such acceptance he immediately becomes amenable to the jurisdiction of the court, and thereafter the parties and estate become subject to the supervision and control of the court; and the trust will not be permitted to fail for a subsequent omission of duty, but the court will require the proper security, or remove the assignee and appoint his successor, as the case may require.—*Strong v. Brown*, Minn., 43 N. W. Rep. 67.

12. ATTACHMENT—Contract.—Attachment will lie in an action on an account containing an item for damages for injury to a horse while in possession of a bailee for hire by overdriving, under Code Miss. § 2414, which provides that "the remedy by attachment shall apply to all actions or demands, founded upon an indebtedness, or for the recovery of damages for the breach of any contract, express or implied," etc., which must be construed to mean that, whenever *assumpsit* will lie for breach of an implied contract, attachment is maintainable to recover damages therefor, although the breach be tortious.—*Nethery v. Belden*, Miss., 6 South. Rep. 464.

13. ATTACHMENT—Jurisdiction.— Where the undertaking required by statute to be filed before the issuance of a warrant of attachment is fatally defective as filed, the court is without jurisdiction, and cannot amend the undertaking after the issuance of a warrant. — *Wagener v. Booker*, S. Car., 9 S. E. Rep. 1055.

14. CONTEMPT—Power to Punish Summarily.—Rev. St. U. S. § 725, gives the federal courts power to punish contempts of their authority, *inter alia*, in case of "misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice:" *Held*, that while the same offense is embraced in Rev. St. § 5399, and punishable by indictment, that method of procedure is not exclusive, and the court may proceed summarily, under § 725.—*Ex parte Savin*, (U. S. S. C.) 9 S. C. Rep. 699.

15. CONTRACTS.—The usual course of dealing between the parties under a contract, and their own practical construction thereof, will be considered in determining their rights and liabilities in transactions under it. — *First Nat. Bank v. Jagger*, Minn., 43 N. W. Rep. 70.

16. CONTRACTS—Statute of Frauds.—A contract of sale by a limited partnership association of the State of Pennsylvania, organized under the act of June 2, 1874, which will impose a liability exceeding $500 for nonperformance, cannot be enforced against the association, either in a court of law or equity, unless in writing and signed by at least two managers of the association. — *Andrews Bros. Co. v. Youngstown Coke Co.*, (U. S. C. C.) Penn., 39 Fed. Rep. 353.

17. CORPORATIONS—Stock — Dividends. —When a corporation declares a dividend, the earnings represented by the dividend are no longer represented by the stock, but become a debt due to the owner of the stock at the time of the declaration, and this right of the stockholder does not pass by a transfer of the stock, in the absence of a special agreement. That the dividend is payable at a future date does not affect the stockholder's right. — *Wheeler v. Northwestern Sleigh Co.*, (U. S. C. C.) Wis., 39 Fed. Rep. 347.

18. COURTS—Jurisdiction — The courts of ordinary in Georgia are courts of original, exclusive, and general jurisdiction over decedents' estates, the appointment, removal, and discharge of administrators, etc., and their judgments in relation to such matters are no more open to collateral attack than are the judgments of any other court of general jurisdiction. — *Veach v. Rice*, (U. S. S. C.) 9 S. C. Rep. 730.

19. COURTS— Jurisdiction. — In case one suit in which the amount demanded is $400 to be consolidated with another in which the defendant in the former is plaintiff and claims $1,676.42, this court has no jurisdiction of the consolidated cases, because in no event could this court render judgment for an amount in excess of the latter sum.—*Davis v. Bargas*, La., 6 South. Rep. 469.

20. CREDITORS' BILL—Traders.— Code Ga. § 3149*a*, provides that, in case any trader shall fail to pay one or more debts at maturity, and shall be insolvent, a court of equity may, under a creditor's bill, proceed to collect the assets, real and personal, and appropriate the same to the creditors: *Held*, that the fact that the sheriff seized defendant's stock of goods under a mortgage *fi. fa.*, before daylight in the morning, five hours before the injunction was granted, did not deprive defendant of his character of trader, so as to preclude the filing of an application for injunction and receiver, under the above section.—*Wilcox v. Dunlap*, Ga., 9 S. E. Rep. 1046.

21. CRIMINAL LAW—Larceny. — On a prosecution for larceny declarations of the accused, made previous to and at the time of arrest, are admissible to show intent and to repel the charge of felonious taking. The objection goes more to the effect than to the admissibility.—*State v. Young*, La., 6 South. Rep. 468.

22. CRIMINAL LAW—Forgery.—Under § 4451, of the Code the forging of any writing not otherwise provided for, with intent to defraud any person or persons, is made penal, and it need not appear on the face of the indictment in what manner or by what means the consummation of fraud would be possible. It is enough if the writing might defraud, or might be used to defraud. At least this is so where the indictment is not demurred to, and the question arises upon a motion in arrest of judgment.—*Travis v. State*, Ga., 9 S. E. Rep. 1063.

23. CRIMINAL LAW—Murder. — The offense of murder in the first degree may be proved by the mere fact of the killing, and the attendant circumstances; and where there are no circumstances to prevent or rebut the presumption, the law will presume that the unlawful act was malicious as well as intentional, and was prompted and determined on by the ordinary operations of the mind.— *State v. Brown*, Minn., 43 N. W. Rep. 69.

24. CRIMINAL LAW — Accessory. — The guilt of the alleged principal is, under the common law, essential to the conviction of one indicted as an accessory before the fact. Where an indictment is against three persons, charging each of them with murder as principal in the first degree, and the others as his accessories before the fact as at common law, and one of them is put on trial, and the jury finds him guilty under a count charging him as accessory, and subsequently, but before the entry of the judgment on this verdict, the one charged as principal in the count mentioned is tried and acquitted, judgment cannot be entered against the one found guilty as an accessory. — *Bowen v. State*, Fla., 6 South. Rep. 459.

25. CRIMINAL LAW—Assault.—In indictment for assault with intent to murder by stabbing includes the minor offense by stabbing, and a verdict finding this minor offense need not negative the exception in the statute by setting out that the stabbing was not done by the prisoner "in his own defense, or other circumstances of justification."— *Isom v. State*, Ga., 9 S. E. Rep. 1051.

26. CRIMINAL PRACTICE — Quashing Indictment. — A motion to quash an indictment for the reason that the clerk of the court had not been sworn as a member of

a jury commission, made after arraignment but before trial, will be considered as seasonably made, if it appear from the record that the defect was not known to the accused or his counsel on the first day of the term or before arraignment.—*State v. Strickland*, La., 6 South, Rep. 471.

27. CRIMINAL PRACTICE—Continuances.—The ruling of a trial judge, in a criminal case, refusing a continuance, on the ground that the counsel for the accused had not been notified of the order assigning the case for trial, will not be disturbed, if it appears that on the day fixed the accused, his counsel, and all the witnesses on both sides were present.—*State v. Crawford*, La., 6 South. Rep. 471.

28. CRIMINAL PRACTICE— Witness. — Where a witness for the prosecution, in a trial for murder, testifies inconsistently with his testimony at the coroner's inquest, it is not error to call his attention to what he has testified to before the coroner, and, upon his denial thereof, to read such testimony to the jury. — *People v. Bushton*, Cal., 22 Pac. Rep. 127.

29. CRIMINAL PRACTICE—Jurors. — An exception was taken to the overruling of a question propounded to two jurors on a *voir dire* whether they knew of the feuds existing between two families, in which defendant had engaged, and whether they had taken sides therein. The record did not show that either of the jurors were sworn or served as jurors, nor that defendant had exhausted his peremptory challenges before the jury was finally impaneled: *Held*, that as these facts were not affirmatively shown there was no error prejudicial to defendant. — *Territory v. Campbell*, Mont., 22 Pac. Rep. 121.

30. CRIMINAL PRACTICE—Grand Jury. — The fact that after a large number of witnesses had been examined by the grand jury, and the district attorney had been instructed to prepare indictments against defendants, the jury dispensed with the reading of the indictments, and returned them into court without knowing their exact contents, because of the statement made to them by the attorney that it would take three hours to read them, and that the supreme court justice wanted to leave and wanted the indictments found before he left, affords no ground for setting aside the indictments. — *United States v. Terry*, (U. S. D. C.) Cal., 39 Fed. Rep. 355.

31. DISSEISOR — Rents and profits. — It is the rule in Louisiana that the liability of a disseisor to account for rents and revenues must be restricted to the time he was in possession, the rule of the civil law to the contrary never having been adopted there, and he cannot be held primarily liable for rents accruing during the possession of his grantee.— *City of New Orleans v. Christmas*, (U. S. S. C.) 9 S. C. Rep. 745.

32. DIVORCE—Fraud.—The district court may vacate a decree of divorce, upon a summary application seasonably made, for fraudulent practices in obtaining it. — *Olmstead v. Olmstead*, Minn., 43 N. W. Rep. 67.

33. EMINENT DOMAIN. — Whenever it is proposed to appropriate the lands of a citizen to public use, the proceeding by which it is to be done must conform to the requirements of the statute, and contain such a description of the lands to be so taken as may be ascertained from its record.— *Ames v. Union County*, Oreg., 22 Pac. Rep. 118.

34. EQUITY—Pleading. — A bill by a widow against an heir, charging him with fraudulently procuring from her a quitclaim deed to the land of her deceased husband, and alleging that said heir had mortgaged the property to his co-defendant, who had full knowledge of the fraud, and that the latter had purchased part of the property at foreclosure sale, and that the residue was sold to an innocent purchaser, is not demurrable because, besides asking general relief, it prays specifically to be allowed to redeem the whole property from the mortgage, as under the facts and prayer for general relief complainant could have relief as to her dower interest.—*Jones v. Van Doren*, (U. S. S. C.) 9 S. C. Rep. 685.

35. EQUITY—Quieting Title.—An amended bill, alleging that defendant T, was in possession of complainant's land as his agent; that his co-defendant M, knowing complainant to have perfect title to the land, falsely represented it to be unappropriated, and thus procured a patent therefor from the State; and that T collusively surrendered possession to M, and praying alternatively that complainant's title and possession might be quieted, or that he might be reimbursed for his improvements, if the title should be adjudged to be in M, presents a case for which there is no adequate, legal remedy, and a demurrer to the whole bill should be overruled.—*Stewart v. Masterson*, (U. S. S. C.) 9 S. C. Rep. 682.

36. EQUITY. — Where in a common-law action, a defense on equitable grounds consists of matter clearly available as a defense at law, the court, without motion, should strike it out. Such a defense is admissible only when it sets up matter for which, in the event of a judgment at law, equity would, on account of the equities set up, give him relief against the judgment.— *Marshall v. Bumby*, Fla., 6 South. Rep. 480.

37. EQUITY JURISDICTION—Waiver. — Where, in a suit in equity, the defendant goes to trial on the merits, it is too late afterwards to raise the objection that the plaintiff has an adequate remedy at law.— *St. Paul, etc. R. Co. v. Robinson, County Auditor*, Minn., 43 N. W. Rep. 75.

38. EXECUTION—Tax Collector.— Where an execution, issued by the county commissioners against a delinquent tax collector, has been signed by the commissioners, the signature of the clerk is not necessary to its validity. — *Pulaski County v. Pollock*, Ga., 9 S. E. Rep. 1065.

39. EXECUTORS AND ADMINISTRATORS. — Creditors' right of action against the administrator of their deceased debtor accrues from the time the administrator's final account showing assets is settled and approved, notwithstanding appeals are taken from the decree; and on the subsequent death of the administrator's surety their claims are barred by the Arkansas statute of non-claim unless presented against his estate within two years thereafter.—*New Orleans Canal & Banking Co. v. Reynolds*, (U. S. C. C.) Ark., 39 Fed. Rep. 373.

40. EXEMPTION. — A light two-seated vehicle, owned and used by the debtor: *Held*, exempt under the statute. Following Allen v. Coates, 29 Minn. 46, 11 N. W. Rep. 132.—*Kimball v. Jones*, Minn., 43 N. W. Rep. 74.

41. EXEMPTION. — Insurance money due on a house, occupied as a homestead, which has been burned, represents a personal contract of indemnity with the owner, and not the house itself, and is not exempt from execution under a law exempting the homestead, exemption laws being strictly construed.—*Smith v. Ratcliff*, Miss., 6 South. Rep. 460.

42. FEDERAL COURTS — Jurisdiction. — A suit was brought in the United States circuit court for Ohio for the foreclosure of a mortgage on defendant's railroad, which extends through Ohio and West Virginia. After the appointment of a receiver in that suit, complainant filed a bill termed an "ancillary bill," in the United States circuit court for West Virginia, reciting the proceedings in the first suit, and exhibiting a copy of the bill therein, and praying the court to take "ancillary jurisdiction" and furnish such relief as might be necessary to accomplish the purposes of the first suit and for such other relief as the nature of the case may require," etc.: *Held*, that the bill should be dismissed. If the aid of the court in West Virginia is desired in enforcing the mortgage, it must be invoked by an independent suit. —*Mercantile Trust Co. v. Kanawha, etc. Ry. Co.*, (U. S. C. C.) W. Va., 39 Fed. Rep. 337.

43. FINES—Costs.— When a person, arrested under a *capias pro fine*, in favor of the commonwealth of Virginia for the satisfaction of certain fines and costs due the State, tenders the amount of the same in genuine coupons cut from the State bonds, which by law are receivable for all fines due the State, he is entitled to his discharge, and the acceptance of the coupons can-

not be refused on the ground that the costs belong to the officers, as there is no indebtedness on the part of the prisoner to the officers individually for their work and labor.— *In re Mitchell*, (U. S. C. C.) Va., 39 Fed. Rep. 396.

44. FRAUDULENT CONVEYANCE.— A deed executed by a grantor and accepted by his grantees with a full knowledge of the marital rights of his wife in the property conveyed thereby, and with an intention to supplant and avoid them, is, although upon a sufficient consideration, a fraud upon such rights, and void as to the grantor's widow.— *Nichols v. Nichols*, Vt., 18 Atl. Rep. 158.

45. FRAUDULENT CONVEYANCES.— A conveyance made by an intestate during his life-time to his children, without any intent to defraud his creditors, which leaves sufficient property to pay all debts then owing by him, cannot be assailed and set aside by his creditors though, after the expenses of administration upon his estate have been paid, there are not sufficient assets to pay his debts. — *Wilbur v. Nicholas*, Vt., 18 Atl. Rep. 154.

46. FRAUDULENT CONVEYANCES.— Under Acts Ga. 1887, p. 64, establishing a uniform procedure in actions, legal and equitable, and conferring jurisdiction of both on the superior courts, an action can be maintained against a debtor and those to whom he has conveyed property to defraud his creditors, to annul such conveyances and to subject the property to the payment of the plaintiff's debt, though the latter has not recovered a judgment therefor, and exhausted his legal remedy.—*De Lacy v. Hurst*, Ga., 9 S. E. Rep. 1052.

47. GARNISHMENT.—Where chattels were sold, and the purchaser agreed to pay the balance of the consideration after the claims of third parties against the seller had been settled, such purchaser is not liable, in garnishment proceedings, to a creditor of the seller until the amount of such claims is ascertained, and then only as debtor, and not as having money in his hands subject to garnishment.—*Durling v. Peck*, Minn., 43 N. W. Rep. 65.

48. GUARDIAN AND WARD. — Where a guardian settles with his ward, who has, at the time, attained her majority, and without the knowledge or consent of the sureties on the guardian's bond, and in his settlement with the ward, the guardian, for a balance, due the ward, gives her his notes at twelve months, with 12 per cent. interest per annum, and the ward, by her acts, confirms such settlement, and acquiesces therein for eight years, no fraud or improper influence being shown, and the guardian, in the mean time, becomes insolvent: *Held*, that the sureties on the guardian's bond were released therefrom by such acts of the ward. —*Hart v. Stribling*, Fla., 6 South. Rep. 455.

49. INJUNCTION— Pleading. — Where a bill, filed by a creditor of a firm against the members thereof, individually and as partners, and others, to restrain the foreclosing of a chattel mortgage upon the property of defendant F, and the collection of a debt owed by him to a certain bank, which was secured by a deed from defendants, F and B as partners, alleges fraud and conspiracy on the part of the defendants to defeat the claims of the general creditors of the defendant firm, which is denied in their answer, but fails to allege the insolvency of either the mortgagee or the bank, an injunction will not be granted. — *Atlanta Nat. Bank v. Fletcher*, Ga., 9 S. E. Rep. 1072.

50. INTOXICATING LIQUORS.— In a prosecution for violation of the local option statute, it was necessary for the indictment to allege that the election to decide whether the sale of liquors, wines, or beer should be prohibited in Franklin county was held in pursuance to the provisions of said statute, or to state facts and circumstances sufficient to show that said election was held in pursuance to the provisions of the statute; and the indictment failing to show either, it is fatally defective.—*Cook v. State*, Fla., 6 South. Rep. 451.

51. JUDGMENT—Subrogation. — Complainant obtaine a decree declaring his judgment a lien, subsequent to that of two other judgment creditors, on property which the debtor had conveyed to defendant. From this decree defendant appealed, and, pending the appeal, those holding the prior liens advertised the property for sale. Before sale complainant paid the two judgments: *Held*, that the payment of these judgments entitled him to be subrogated to the rights of the creditors who held the prior liens. — *Hackensack Sav. Bank v. R. P. Terhune Manuf'g Co.*, N. J., 18 Atl. Rep. 155.

52. JUDGMENT. — Where defendant executed his notes for the amount of a judgment rendered against him which was subsequently canceled, the judgment ceased to exist, and there was no longer a lien upon defendant's real estate, when no fraud was imputable in obtaining the cancellation. — *Polk County v. Nelson*, Iowa, 43 N. W. Rep. 80.

53. JUDGMENT—Conveyance. — Land held by absolute deed as security for a debt still unpaid, is subject to levy and sale as the property of the vendee, under a judgment against him, no matter whether the judgment creditor gave credit on the faith of the property so held or not. The purchaser at sheriff's sale would acquire the right to receive the money due on the secured debt, as in the ordinary case of purchase money, where bond for titles is outstanding. Redemption of the land would be accomplished by paying to him what would otherwise be payable to the original vendee. If the deed was made to defraud the vendor's creditors, as well as to secure a debt, the land to the extent of its whole value would be subject to judgments against the vendee, as against a statutory claim interposed by the vendee himself. — *Parrott v. Baker*, Ga., 9 S. E. Rep. 1068.

54. JUDGMENT—Usury.—After judgment upon a promissory note bearing legal inrerest according to its face, (no plea of *non est factum* or of usury having been filed to the action,) it is not competent for the debtor or his wife to prove by extrinsic evidence, in order to avoid the effect of a waiver of homestead or exemption, that the note was altered by the creditor before suit was brought, from an usurious rate to a legal rate of interest. Such extrinsic evidence would be inconsistent with the judgment. — *Stewart v. Stisher*, Ga., 9 S. E. Rep. 1041.

55. LANDLORD AND TENANT.— An action for rent or for use and occupation will not lie where there is no contract relation or relation of landlord and tenant. Negotiations between the parties which have no result do not amount to a recognition of one as landlord under whom the entry was not made, and against whom the right of occupation is claimed adversely. — *Lathrop v. Standard Oil Co.*, Ga., 9 S. E. Rep. 1041.

56. LIEN — Pledges. — A, having sold an agricultural product of this State, in the City of New Orleans, to B, on five days' credit, and B having, within the five days' limit, pledged the bills of lading therefor to C, and, as against the assertion of A's lien, C having set up a claim of ownership: *Held*, that C cannot subsequently, and in the same suit, without any change of pleading, abandon his claim of ownership, and assert, in argument, a lien and privilege resulting from his pledge. — *Cohen v. Haynes*, La., 6 South. Rep. 472.

57. LIMITATION OF ACTIONS — Bankruptcy. — Section 5108, Rev. St. U. S. 1878, does not prohibit the commencement of an action upon a provable claim against a person who has been adjudged bankrupt under the national bankruptcy act. — *Davidson v. Fisher*, Minn., 43 N. W. Rep. 79.

58. MASTER AND SERVANT— Negligence. — In an action by a railroad engineer against the company for personal injuries received while in the discharge of his duties, defendant contended that plaintiff was guilty of contributory negligence, because he was running at a greater rate of speed than he had been instructed to run, and because defendant's rules limited the speed to a certain rate before crossing trestles, while the ac-

cident happened near the trestle, when plaintiff was exceeding that rate. Plaintiff's evidence showed that he had been over the road but once before, did not know that the trestle was near, and had never seen or heard of the train rules. Defendant's superintendent testified that he knew that plaintiff had been over the road but once before, instructed him not to exceed a certain rate of speed, and that he did not know that plaintiff had ever seen or read defendant's rules: *Held*, that the question of contributory negligence should have been submitted to the jury.—*Dunlap v. Northeastern R. Co.*, (U. S. S. C.) 9 S. C. Rep. 647.

59. MORTGAGES—Sales under Power.— Notice of a sale of lands under a power in a mortgaged deed, which sets out correctly the place of record of the mortgage, is sufficient, though neither the name of the mortgagor nor the mortgagee, nor of any one connected with the mortgagor, is given, Any one desiring to know the names can learn them from the record. — *Cogan v. McNamara*, R. I., 18 Atl. Rep. 157.

60. MORTGAGES—Redemption.—A redemption of lands from a mortgage foreclosure, made through the bank check of a responsible party drawn upon a solvent bank, and accepted by the sheriff as money, is not invalid for that reason, if the money is promptly realized thereon, and ready for the proper party when required, and within the redemption period.—*Sardeson v. Menage*, Minn., 43 N. W. Rep. 66.

61. MORTGAGES — Foreclosure. — In an action merely for the foreclosure of a mortgage covering an undevided interest in land, the nature and extent of such interest are not matetrs pertinent to the question whether plaintiffs are entitled to a judgment of foreclosure.—*Wylie v. Lipsey*, S. Car., 9 S. E. Rep. 1056.

62. MORTGAGE—Foreclosure. — To authorize the foreclosure by advertisement of a mortgage by the assignee thereof, the assignment must have been duly acknowledged and recorded and if the same is not properly acknowledged, so as to entitle it to be recorded the foreclosure is a nullity.— *Lowry v. Mayo*, Minn., 43 N. W. Rep. 78.

63. MUNICIPAL CORPORATIONS—Bonds. — Rev. St. Tex. 1879, tit. 17, ch. 4, p. 72, authorizing municipal corporations to issue bonds, provides, by art. 422, that the bonds shall be signed by the mayor of such city: *Held*, that the city council has no power, after the term of a mayor has expired, to authorize him to sign bonds as of a date during his term of office. — *Coler v. City of Cleburne*, (U. S. S. C.) 9 S. C. Rep. 720.

64. MUNICIPAL CORPORATIONS— Ordinance.—In a complaint against a party, charging him with an offense for an alleged violation of a city ordinance, made before a city tribunal authorized to take cognizance of such matters, the facts constituting the offense must be set out in a complaint as fully and completely as they are required to be stated in an indictment for a similar offense against the State.— *Cunningham v. Berry*, Oreg., 22 Pac. Rep, 115.

65. NEGLIGENCE—Damages. — Evidence *held* sufficient to show that the damage to plaintiff's lot, which is the subject of the action, was caused by the defendant's excavation upon an adjoining lot. It is immaterial that the excavation which was made for defendant under the direction of its engineers was done by contract at so much a yard.—*Kopp v. Northern Pac. R. Co.*, Minn., 43 N. W. Rep. 72.

66. PARTNERSHIP — Silent Partner. — In an action to charge one as a silent partner, the submission to the jury, for their construction, of written agreements, which it is contended disprove the partnership relation, it is error of which plaintiff cannot complain, where it appears that the effect of the agreements was to dissolve a formerly existing partnership.— *Currier v. Robinson's Estate*, Vt., 18 Atl. Rep. 147.

67. PATENTS FOR INVENTIONS—Infringement. — A preliminary injunction against the infringement of a patent will be denied where plaintiff does not show a prior adjudication sustaining the validity of the patent, or public acquiescence on which a presumption of validity may be based, and where it does not clearly appear that there is an infringement.— *Raymond v. Boston Hose Co.*, (U. S. C. C.) Mass., 39 Fed. Rep. 365.

68. PRACTICE—Arrest of Judgment. — A motion in arrest of judgment is not the proper plea to urge against an error in the proceedings touching the time or manner of impaneling a petit jury. Such a vice in the record can be taken advantage of by an assignment of error filed in this court. — *State v. Price*, La., 6 South. Rep. 470.

69. PRINCIPAL AND AGENT.— Where one deals with the agent of the assignees for the benefit of creditors with full knowledge of the true relation which such agent occupies to the property and the outstanding equities, he does so at his peril. — *Foster v. Virtue*, Oreg., 22 Pac. Rep. 113.

70. SALE—Conditional.— In an action by the vendee of certain cattle against the vendor and others for converting them, the defense being that the sale was conditional and that the vendor had the right to retake possession, if the bill of sale in evidence was not given to pass the absolute title, but simply to enable plaintiff to get possession of the cattle, and if it was agreed that they were to remain the property of the vendor until certain notes given for the purchase was paid, the vendor still retained the title and had the right, on default, to retake the cattle and sell them, but if there was no such agreement, and the notes were given and accepted as absolute payment, without reservation of lien, the vendor could have no right to retake the cattle.—*Segrist v. Crabtree*, (U. S. S. C.) 9 S. C. Rep. 687.

71. STATUTES — Evidence. — The compilation of the general statutes of Oregon, provided for in the act of February 26, 1885, and published in two volumes, with the certificate of the governor, of August 9, 1887, prefixed thereto, as required by said act, is *prima facie* evidence of the general statutes of Oregon then in force, which may be cited and referred to in both judicial and legislative proceedings, by the chapter, title, and section as therein arranged, set down, and enumerated. — *The Borrowdale*, (U. S. D. C.) Oreg., 39 Fed. Rep. 376.

72. TAX-TITLES. — The statute, which requires notice of the expiration of the time of redemption of land sold for taxes to be served upon the person in whose name the land is assessed, also requires that in certain cases it shall be served upon the person in actual occupation of the premises, and in others it shall be published. It was the purpose of the statute to adopt a mode of service calculated to reach those interested in effecting a redemption, and that the notice should issue in all cases, as well where the tax-certificate is held by the person in whose name the land is assessed as in other cases.—*Wakefeld v. Day*, Minn., 43 N. W. Rep. 71.

73. TRESPASS.—In an action for trespass, in "willfully and maliciously driving sheep on the lands of plaintiff to consume and destroy the grass," it is proper to charge the jury that "if defendant's sheep strayed on the uninclosed lands of plaintiff, or were driven thereon for pasturage, and not for the purpose of maliciously injuring the lands, plaintiff could not recover." — *Fant v. Lyman*, Mont., 22 Pac. Rep. 120.

74. TRUSTS—Conveyance.— A trust created by will being nominally for the testator's daughter and her children, born and to be born, but the daughter to have the possession, profits, use, enjoyment, and control of the property during her life, and at her death the same to be divided among her surviving children, and the children of her deceased children, the appointment of a new trustee for the daughter alone, made at chambers, under the act of February 20, 1854, upon the joint petition of her and the original trustee, without representation or consent of the children, did not invest the trustee so appointed with the legal fee, but only with a legal estate commensurate with the daughter's equitable estate for life. — *Lamar v. Pearre*, Ga., 9 S. E. Rep. 1043.